

REPORTS OF CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

SEPTEMBER TERM, 1896—JANUARY TERM, 1897.

VOLUME L.

D. A. CAMPBELL,
OFFICIAL REPORTER.

LINCOLN, NEB.:
STATE JOURNAL COMPANY, LAW PUBLISHERS.
1897.

Entered according to act of Congress in the office of the Librarian of Congress,
A. D. 1897,

BY D. A. CAMPBELL, REPORTER OF THE SUPREME COURT.

In behalf of the people of Nebraska.

THE SUPREME COURT
OF
NEBRASKA.

1897.

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S. H. SEDGWICK.....	York.

Sixth District—

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W. G. HASTINGS.....	Wilber.
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Ninth District—

J. S. ROBINSON.....	Madison.
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Tenth District—

F. B. BEALL.....	Alma.
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Eleventh District—

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J. R. THOMPSON.....	Grand Island.

DISTRICT COURTS OF NEBRASKA. v

Twelfth District—

H. M. SULLIVAN Broken Bow.

Thirteenth District—

H. M. GRIMES North Platte.

Fourteenth District—

G. W. NORRIS Beaver City.

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SUPREME COURT COMMISSIONERS.

(Laws, 1893, chapter 16, page 150.)

SECTION 1. The supreme court of the state, immediately upon the taking effect of this act, shall appoint three persons, no two of whom shall be adherents to the same political party, and who shall have attained the age of thirty years and are citizens of the United States and of this state, and regularly admitted as attorneys at law in this state, and in good standing of the bar thereof, as commissioners of the supreme court.

SEC. 2. It shall be the duty of said commissioners, under such rules and regulations as the supreme court may adopt, to aid and assist the court in the performance of its duties in the disposition of the numerous cases now pending in said court, or that shall be brought into said court during the term of office of such commissioners.

SEC. 3. The said commissioners shall hold office for the period of three years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of the supreme court, payable at the same time and in the same manner as salaries of the judges of the supreme court are paid. Before entering upon the discharge of their duties they shall each take the oath provided for in section one (1) of article fourteen (14) of the constitution of this state. All vacancies in this commission shall be filled in like manner as the original appointment. *Provided*, That upon the expiration of the terms of said commissioners as hereinbefore provided, the said supreme court shall appoint three persons having the same qualifications as required of those first appointed as commissioners of the supreme court for a further period of three years from and after the expiration of the term first herein provided, whose duties and salaries shall be the same as those of the commissioners originally appointed. (Amended, Laws, 1895, chapter 30, page 155.)

See page xlvii for table of Nebraska cases overruled.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1896.

PRESENT:

HON. A. M. POST, CHIEF JUSTICE.

HON. T. O. C. HARRISON, }
HON. T. L. NORVAL, } JUDGES

HON. ROBERT RYAN, }
HON. JOHN M. RAGAN, } COMMISSIONERS.
HON. FRANK IRVINE, }

SARAH C. WEBSTER, APPELLANT, V. CITY OF LINCOLN
ET AL., APPELLEES.

FILED DECEMBER 16, 1896. No. 6444.

1. Appeal from Board of Equalization. No appeal will lie from the determination of a board of equalization on a hearing of a matter of equalization of an assessment of taxes, unless an appeal is provided by law.
2. ———: JUDGMENT. The decision of a board in the equalization of an assessment of taxes is final and the consequent order a final one; hence it may be reviewed by an error proceeding.
3. ———. As a general rule, a proceeding in error to review the order of a board of equalization, in a matter within its jurisdiction, will afford an adequate remedy.
4. Taxation: INJUNCTION: PLEADING AND PROOF. In an action to enjoin the collection of taxes resulting from an order of a board of equalization, where it is claimed a remedy by an error proceeding would be inadequate, the facts upon which such claim is based must be pleaded and proved.

APPEAL from the district court of Lancaster county. Heard below before TIBBETS, J. *Affirmed.*

The opinion contains a statement of the case.

J. R. Webster, G. M. Lambertson, and Samuel J. Tuttle, for appellant:

There is no provision by law for review of the proceedings of the board of equalization by appeal, and the remedy by proceeding in error is not available in such cases, because the board is so constituted that error will not appear ordinarily on the face of the record of its proceedings, and there is no provision for making a bill of exceptions. (*Sioux City & P. R. Co. v. Washington County*, 3 Neb., 40; *Nance v. Falls City*, 16 Neb., 86; *Bradley v. City of Eau Claire*, 14 N. W. Rep. [Wis.], 10; *Ruggles v. City of Fond du Lac*, 53 Wis., 436; *Kelley v. City of Madison*, 43 Wis., 638; *McGee v. State*, 32 Neb., 149.)

Injunction is the proper remedy. (*Hanscom v. City of Omaha*, 11 Neb., 42; *Hurford v. City of Omaha*, 4 Neb., 336; *South Platte Land Co. v. Buffalo County*, 7 Neb., 257; *Touza-lin v. City of Omaha*, 25 Neb., 824; *Darst v. Griffin*, 31 Neb., 672; *Lansing v. City of Lincoln*, 32 Neb., 470; *Reddick v. City of Omaha*, 35 Neb., 128.)

The arbitrary assessment made is contrary to the constitution of the state and beyond the power of the council, because it exempts some benefited property from contributing to cost of the improvement and imposes the entire cost on appellant's property. (*Hanscom v. City of Omaha*, 11 Neb., 41; *Kittle v. Sherwin*, 11 Neb., 81; *City of Ottawa v. Barney*, 10 Kan., 278.)

Abbott, Selleck & Lane, Walter J. Lamb, H. J. Whitmore, and Atkinson & Doty, contra:

Exclusive jurisdiction is given to the mayor and council to determine what property within the paving district is benefited by the improvement, and the amount of benefit to be assessed to each piece of property (*Kansas*

City v. Baird, 11 S. W. Rep. [Mo.], 562); and such jurisdiction, when so exercised by the mayor and council, is exclusive, and its determination, where it has obtained jurisdiction, is conclusive, when attacked collaterally. (*Hagar v. Reclamation District*, 111 U. S., 709.)

Where a party seeks to enjoin the collection of a tax upon real estate, he must set forth such facts in his petition as will show the tax to be either void or its enforcement inequitable. (*Dundy v. Richardson County*, 8 Neb., 508; *South Platte Land Co. v. City of Crete*, 11 Neb., 344; *Spargur v. Romine*, 38 Neb., 736.)

The action of the mayor and city council determining the amount of special benefit is conclusive. (*Fagan v. City of Chicago*, 84 Ill., 231; *Bigelow v. City of Chicago*, 90 Ill., 49; *Davies v. City of Saginaw*, 87 Mich., 439; *Litchfield v. Vernon*, 41 N. Y., 123; *Town of Macon v. Patty*, 57 Miss., 378; *City of St. Louis v. Oeters*, 36 Mo., 456; *City of Philadelphia v. Field*, 58 Pa. St., 320; *Mayor of Baltimore v. Johns Hopkins Hospital*, 56 Md., 1; *Teegarden v. City of Racine*, 56 Wis., 545; *Chamberlain v. City of Cleveland*, 34 O. St., 552; *Grand Rapids School Furniture Co. v. City of Grand Rapids*, 52 N. W. Rep. [Mich.], 1028.)

A court of equity has no jurisdiction to re-examine the proceedings and judgments of the city court in reference to assessments. (*Methodist Church v. City of Baltimore*, 6 Gill [Md.], 391; *McGee v. State*, 32 Neb., 149; *Welty*, Assessments, sec. 312.)

HARRISON, J.

The plaintiff commenced this action against the city of Lincoln to restrain the collection of what was alleged to be an inequitable tax assessed upon her property to pay the cost of paving on the street which the property adjoins. The Lambertsons, of defendants, were brought into the case, or impleaded, at the instance of the city and filed a cross-petition, by which it was sought to have the collection of special taxes against their property restrained, the reasons for the relief, as to them, being in

substance the same as those alleged to exist as to the property of plaintiff. The situations, relatively, of the streets and the properties affected by the taxes assessed to pay for the improvement of one street (Fourteenth), being that toward which our attention must be particularly directed at this time, will be quite readily understood from a perusal of the findings of the district court at the time it determined the issues presented in the case and which we will hereinafter quote. It appears that during the pendency of the suit the properties were sold at delinquent tax sale and that further pursuance of such proceedings has been enjoined. Tender of the amount conceded to be due was in each instance made to the proper officer. Trial of the cause in the district court resulted in a judgment favorable to the city, of the dismissal of the action of the petitioner and cross-petitioner. The findings of the trial court were as follows:

"1. The defendant, the city of Lincoln, is a municipal corporation organized under the laws of the state of Nebraska, as a city of the first class with over twenty-five thousand inhabitants.

"2. That the plaintiff is the owner of lot No. 36, described in her petition, with Q street on the south and Fourteenth street on the west; and that the defendant Lamberton is the owner of lot No. 35, described in said Lamberton's cross-petition, with R street on the north and Fourteenth street on the west; that each of said lots is 150 feet square, and together constitute a strip of land 300 feet long, north and south, and 150 feet wide, east and west; that the block of which said lots form a part is a rectangular tract extending 300 feet north and south and 720 feet east and west, and is bounded by Q street on the south, Fourteenth street on the west, R street on the north, and Sixteenth street on the east.

"3. That by ordinance duly passed and approved February 2, 1888, the defendant city created paving districts Nos. 4, 5, 6, 7, 8 of said city; that said ordinance was amended by ordinance approved February 23, 1888, the

material part of said ordinance being annexed to said city's cross-petition, marked 'Exhibit A,' and was subsequently amended by ordinance approved May 27, 1890, the material part of which is annexed to said city's cross-petition, marked 'Exhibit B.'

"4. That said district No. 5, as so created by said ordinances, included the streets and intersections surrounding the block described in finding 2, and including 150 feet upon each side of the said streets.

"5. That by ordinance approved April 23, 1891, the said defendant city further amended the said ordinance creating the said paving districts, and in said amended ordinance it was provided that the fifth paving district should include all estate on both sides of the streets in said district to the depth of 150, except that estate on the west side of Sixteenth street between Q and R streets, and that estate on the east side of Fourteenth street between Q street and R street, which shall be the depth of 360 feet.

"6. That by ordinance approved February 20, 1888, the defendant city ordered said paving districts Nos. 3, 4, 5, 6, 7, and 8 paved.

"7. That in pursuance of said order, that portion of Q, R, and Fourteenth streets surrounding the block above described was paved in 1890, and that portion of Sixteenth street adjoining said block was paved in 1891.

"8. The cost of paving Q and R streets adjoining said block was duly assessed by said defendant city upon all the property in said block fronts proportionate to the front feet of the respective lots in the block and to the depth of 150 feet.

"9. That on the 26th day of May, 1890, the defendant city made an assessment upon the block in question for the paving of Fourteenth street adjoining said block, and in making such assessment the said defendant city assessed the first 25 feet with 33 1-3 per cent of the cost of said paving, the second twenty-five feet with 20 per cent of the cost of such paving, the third 25 feet with 16 2-3

per cent of the cost of such, the fourth, fifth, and sixth 25 feet each 10 per cent; the total assessment being made to the depth of 150 feet from said Fourteenth street, and no more.

"10. That on the — day of —, 1891, the defendant city made an assessment upon the block in question for the paving of that portion of Sixteenth street adjoining the said block, and in making such assessment the defendant city assessed the property in said block to the middle thereof, a distance of 360 feet, dividing said distance into six equal parts, and assessing these parts in accordance with the rule laid down in finding 9, assessing the first 60 feet west of Sixteenth street at 33 1-3 per cent of the entire amount of such assessment, the second 60 feet 20 per cent thereof, the third 60 feet 16 2-3 per cent thereof, the fourth, fifth, and sixth 60 feet each 10 per cent of such assessment.

"11. The original plat of the city of Lincoln divides the original city into blocks 300 feet square, and in paving said original city the defendant has adopted and followed the plan of assessing the lots in such blocks in accordance with the foot frontage as to the paving in front of the lots, and assessing the said lots in accordance with the rule laid down in finding 9, as to the side streets of said lots or blocks, and assessing to the center of the said blocks.

"12. The assessment as set forth in finding 9 leaves 210 feet in the rear of the property assessed for the paving of Fourteenth street, extending to the middle of the block, that would bear no burden and no assessment for the paving of the side streets east and west of said block.

"13. None of the owners of this 210 feet above referred to have any access from their property to said Fourteenth street through any alley or over any property fronting or abutting said Fourteenth street owned either by the plaintiff or Lambertson, and the property of the plaintiff and Lambertson occupies all the frontage of Fourteenth street between Q and R streets to the depth of 150 feet.

"14. Fourteenth street is a cross-street of great length, upon a section line connecting the county roads north and south from the city, and is beneficial to the interior of the block in question to not less extent than the paving of Sixteenth street; and the paving of said Fourteenth street, or that portion of it adjacent to the said block, is of special benefit to all the property extending east to the middle of the block, but the extent of such special benefits and its particular distribution as to such property is not shown by the evidence.

"15. The plaintiff and defendant Lambertson each tendered, respectively, the sum of \$464.75 within the fifty days allowed by law for the payment of special assessments and for the benefit of paving Fourteenth street adjacent to their said property; and if apportioned in one-sixth part back to the middle of the block, in accordance with the plan laid down in finding 9, the said sum was the proper sum to be tendered and paid. The said sum was tendered to defendant city and by defendant city refused.

"16. Complainants Webster and Lambertson each appeared before the city council of the defendant city, sitting as a board of equalization upon the said Fourteenth street assessments, and objected to the assessments proposed to be made upon their property as set forth in finding 9, for all the cost of such improvement, and demanded that the assessment be extended to include the property to the middle of the block, a distance of 360 feet from said Fourteenth street; but such demand was by the said board refused, and the assessment was made by the said board of equalization against the protests of the said complainants.

"17. The action of the city council and the board of equalization of the defendant city in making such assessment and levy upon the property of the complainants Webster and Lambertson has never been appealed from, reversed, vacated, or in anywise canceled or set aside.

"18. Since the bringing of this suit the Farmers Loan

& Trust Company, of Sioux City, Iowa, defendant herein, purchased the property of the plaintiff and defendant Lambertson for non-payment of special paving assessments for the paving of Fourteenth street, and now holds the certificate of purchase."

There were further findings, as follows:

"1. That the city council of the defendant, the city of Lincoln, sitting as a board of equalization, in acting upon the special assessments complained of in plaintiff's petition, and complained of in defendant's, Lambertson's, and Samuel J. Tuttle's, guardian *ad litem*, cross-petitions, acted within its authority, and at the time of so acting had jurisdiction of the persons and the subject-matter concerning which it purported to act.

"2. That the action of such board of equalization, unappealed from, was final.

"3. That the plaintiff and defendant Lambertson had an adequate remedy at law, by writ of error from the action of such board of equalization.

"4. That the action of such board of equalization is a bar to this action."

The record of the proceedings of the city council at the time of the assessment of the taxes in question, as introduced in evidence, was as follows:

"*Resolved*, By the mayor and city council of the city of Lincoln, Nebraska, that the cost of paving the streets and alleys in paving district No. 5, in said city, as the said improvement was completed up to the 1st day of April, 1890, and being the following streets and alleys, to-wit: Q street from Eleventh to Sixteenth, R street from Ninth to Seventeenth, Fourteenth street from O to R, be, and the same is hereby, levied and assessed upon the respective property in said district, subject to assessment for the cost thereof, in accordance with the special benefits accruing to said property by reason of said completed improvement; * * * that the real estate in each quarter block is benefited by said improvement to an amount equal to the whole cost of the improving the one-

half of the streets and alleys in its front; * * * that the first one-sixth of each quarter block next to the street or alley paved is specially benefited to an amount equal to thirty-three and one-third per cent of the cost of such improvement along its front; the second one-sixth is specially benefited to an amount equal to twenty per cent of such cost; that the third one-sixth is specially benefited to an amount equal to sixteen and two-thirds per cent, and the fourth, fifth, and sixth one-sixths are each specially benefited to an amount equal to ten per cent; * * * that the special benefits to each of the respective pieces and parcels of real estate in said paving district, by reason of the completion of said improvement, is as shown by the tabulated statement hereto attached, and the cost of said improvement is hereby apportioned and levied and assessed upon the several parcels of real estate in accordance with benefits and as shown by said statement aforesaid," etc.

The tabulated statement referred to in the record we have just quoted showed the plaintiff's property and the Lambertsons' property as charged with the whole of the taxes by divisions of one-sixths, or twenty feet, instead of being, as contended it should have been, by one-sixth divisions, or sixty feet of the 360 feet from the street to the center of the block. According to the provisions of the statutory law governing cities of the class to which Lincoln belongs, the mayor and council were empowered to make the assessments and levy the special assessments, and there was also a board of equalization composed of the members of the city council before which any parties who desired to complain of assessments might appear and present their grievances for hearing and adjustment. The matters of assessments of plaintiff's and the Lambertsons' property were brought before the board of equalization and a hearing had and the following record made of the action then taken:

"Resolved, That the remonstrances against the assessment of paving in the fifth district as made by Mr. Lam-

bertson, Mr. Hargreaves, and others be placed on file, and that the board of equalization refuse to make the change, for the reason that a change would necessitate a change in the ordinance, and the present rate does not work an injustice compared with paving (page 433) and assessments elsewhere in the city."

The mayor and council were authorized by statute to establish paving districts and to assess the cost of paving streets upon the lots and lands especially benefited by the improvements in such district, in proportion to benefits derived therefrom, to be determined by the mayor and council under the provisions of the act.

One question presented for determination is, the complaining parties having appeared before the regularly convened board of equalization and been accorded a hearing, did an appeal lie from the action of such board in respect to the matters adjudicated, or could such action have been reviewed through the medium of error proceedings to the district court, and if, by either appeal or error, review might be had, was the remedy adequate and the only one available to the parties? The law gave no right of appeal from the determination of the board of equalization, and where no right of appeal is provided by law, none exists; hence there was no right of appeal here. The hearing before the board of equalization was one having the semblance of a trial, and the tribunal, the board of equalization, was called upon to consider and adjudicate the questions presented and the determination made was a final disposition, the order made a final one, and hence reviewable in error proceedings to the district court. (Code of Civil Procedure, sec. 580; *Sioux City & P. R. Co. v. Washington County*, 3 Neb., 30.) As a general rule, this would furnish an adequate remedy, and no relief could be sought or afforded by means of proceedings to enjoin any action resulting from and enforcing the adjudication or order of the board of equalization. But it is urged here that there exists no provision of law for perfecting a bill of exceptions of any

matters entering into a hearing before a board of equalization which would necessarily require presentation in such form in order to their proper presentment to the appellate court in error proceedings thereto to secure a review of the action of the board; that where the alleged errors would appear on the face of the record, the remedy by petition in error would be adequate, and an application for an injunction would not lie or be entertained; but where evidence was introduced before the board of subjects otherwise extrinsic to the record, then a bill of exceptions would become indispensable and could not be obtained, from the very nature of the tribunal, its formation, and the cause of the hearing before it. Whether or not a bill of exceptions of any portions of the presentation of the equalization of an assessment before the board could be obtained, and if not, in such case the remedy by error proceedings be inadequate, and an action to procure an injunction, therefore, proper and allowable, need not now be discussed or decided. The question does not arise herein. It is not pleaded, nor does it otherwise appear that in the presentation to the board of equalization of the complaint in regard to the assessments of taxes involved in this action, and against the collection of which a restraining order was demanded, that any evidence was introduced, or any matters presented which required presentation by a bill of exceptions to make them a part of the record in error proceedings to the reviewing court. If it was sought to found the right to an action to enjoin on the inadequacy of the remedy by error proceedings, the facts upon which such claim was based should have been pleaded and proved.

The conclusions reached on the questions considered dispose of the case without a discussion and determination of any of the other matters argued. The judgment of the district court is

AFFIRMED.

GEORGE E. GIBSON ET AL. V. WILLIAM SIDNEY.

FILED DECEMBER 16, 1896. No. 6930.

1. **Action: DEFINITION.** "The term 'action' is a comprehensive one, and is applicable to almost any proceeding in a court of justice, by which an individual pursues that remedy which the law affords him." (1 Ency. Pl. & Pr., 110.)
2. **Cause: DEFINITION.** A cause is "a suit, litigation, or action. Any question, civil or criminal, contested before a court of justice." (Black, Law Dictionary.)
3. **Attachment: MOTION TO DISSOLVE: TRIAL: COSTS.** The hearing of a motion to dissolve an attachment is a "trial" of the issues of law or fact, or both, in an action or cause within the meaning of the term employed in our Code, and the provisions of the fee bill fixing the fees of justices of the peace, and a charge of one dollar taxed and collected with the costs of a case for a second day's attendance upon such hearing by a justice of the peace was not the charging or taking of illegal fees.

ERROR from the district court of Douglas county.
Tried below before SCOTT, J. *Reversed.*

Foster & Boucher and C. P. Halligan, for plaintiffs in error.

Lee Helsley, contra.

HARRISON, J.

It appears herein that an action was commenced before a justice of the peace in Douglas county, in which a writ of attachment was procured to issue and was by an officer levied on property of the defendant. Prior to the day assigned in the summons for hearing of the main cause a motion, supported by affidavits, to discharge the attachment was filed and a day was set for the hearing of said motion, on which the parties appeared by counsel, and after a partial presentation of the matter its further hearing was adjourned to the following day, when it was again taken up, the hearing

completed, and the questions involved decided. In taxing the costs in the case, afterward paid by defendant, the justice of the peace included \$1 as a fee for one day's attendance on the hearing of the motion to discharge the attachment. This, it is claimed, was an illegal charge, unauthorized by law, and the defendant instituted this suit against the justice of the peace and his bondsmen, and in it recovered a judgment in the sum of \$50, the amount allowed by statute to be recovered by the person aggrieved from an officer who charges and takes illegal fees. From the judgment, error proceedings have been prosecuted to this court.

The only question of those argued in the briefs which we deem it necessary to consider is whether the justice of the peace was entitled to charge the \$1 for one of the two days of his attendance on the hearing of the motion to discharge the attachment, and the determination of this hinges in part upon the answer to the query, was the hearing of a motion to dissolve a trial within the meaning of the word "trial" as it appears in the fee bill embodied in our statutes, and also in section 279 of the Code of Civil Procedure? The section last mentioned reads as follows: "A trial is a judicial examination of the issues, whether of law or of fact, in an action." In section 11 of chapter 28 of the Compiled Statutes, in which section the fees of justices of the peace are fixed, appears the following sentence: "Each day's attendance upon trial of a cause, after the first day, one dollar." Section 235 of the Code, by which the right is conferred to file a motion to discharge an attachment, is as follows: "The defendant may, at any time before judgment, upon reasonable notice to the plaintiff, move to discharge an attachment as to the whole or a part of the property attached;" and the next section (236) reads: "If the motion be made upon affidavits on the part of the defendant, or papers and evidence in the case, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to that on which the order of attach-

ment was made." It is clear that the foregoing contemplates a hearing and settlement of issues of either or both law and fact, or, a trial. If so, was it a trial in an "action" or "cause"? "Action" is defined in Black's Law Dictionary as "The legal and formal demand of one's right from another person or party, made and insisted on in a court of justice;" and in Winfield, Adjudged Words & Phrases, "A remedial instrument of justice, whereby redress is obtained for any wrong committed or right withheld." (*Durant v. Supervisors*, 26 Wend. [N. Y.], 86, quoting 3 Bl. Com., 3.) "Any judicial proceeding which, conducted to a determination, will result in a judgment, is an action." "The term 'action' is a comprehensive one, and is applicable to almost any proceeding in a court of justice by which an individual pursues that remedy which the law affords him." (1 Ency. Pl. & Pr., 110.) In Winfield's Adjudged Words & Phrases appears the following: "The primary meaning of the word 'case,' according to lexicographers, is 'cause.' When applied to legal proceedings it imports a state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice;" citing *Kundolf v. Thalheimer*, 12 N. Y., 596; 11 Wis., 516; 48 Tex., 433. In Black's Law Dictionary "Cause" is thus defined: "A suit, litigation, or action. Any question, civil or criminal, contested before a court of justice." But all these are general definitions.

We will turn now to what has been said by this court in particular reference to attachment. In the syllabus to the opinion in *Reed v. Maben*, 21 Neb., 696, it is said: "Attachment, although an ancillary remedy, and applicable to a limited class of cases, yet within its limits rests upon its own facts, and not upon the facts of the action;" and in the body of the opinion appears the following on the same subject: "Attachment is a proceeding ancillary to the main action in which it is allowed. If the main action is attacked and overthrown, the attachment goes with it. On the other hand, it often hap-

pens that while the cause of action is lawful and just, the ground of attachment is mistaken or false; hence, judgment must be rendered for the plaintiff on the merits, but the attachment must be dissolved. As a matter of practice, however, if no ground of attachment exists, or the order has been issued without the proper affidavit or bond, as required by statute, the attention of the court must be called thereto in some appropriate manner, and the question of sufficiency settled before the final judgment in the case." In the case of *Jordan v. Dewey*, 40 Neb., 639, it was stated: "Attachment, though sometimes called an ancillary or auxiliary proceeding, is, nevertheless, in all essential respects a suit. The affidavit of a plaintiff, made to obtain a writ of attachment, and the affidavit of a defendant, when made, denying the truth of the averments of the plaintiff, constitute the pleadings in the proceeding." We are satisfied that an attachment, while it is not an independent action, while it is auxiliary and ancillary to the main action in which it may be obtained, is, nevertheless, an "action" or "cause" within the true meaning of such words as used in the section of our statutes now under consideration; and we are further satisfied that the hearing on a motion to discharge an attachment is such a "trial" of issues of fact or law as fulfills the meaning of the word as it appears in the aforementioned sections of our statutes. It follows that the justice of the peace was entitled to charge and receive \$1 as a fee for the second day's attendance at the hearing of the motion; that his taking such fee was not illegal, consequently the judgment assessing a penalty against him for receiving the fee was wrong and must be reversed and the cause remanded.

REVERSED AND REMANDED.

EDWARD ROYSE ET AL. V. STATE NATIONAL BANK OF
ST. JOSEPH, MISSOURI.

FILED DECEMBER 16, 1896. No. 6870.

1. **Alteration of Instruments: NOTE: ADDITION OF SURETY'S NAME.**
The addition of the name of a surety to a promissory note after its delivery to the payee, without the maker's knowledge, is not such an alteration as will release such maker. (*Barnes v. Van Keuren*, 31 Neb., 165.)
2. **Unauthenticated Bill of Exceptions.** A bill of exceptions not authenticated according to statute will be disregarded upon review.

ERROR from the district court of Custer county. Tried below before HOLCOMB, J. *Affirmed.*

J. S. Kirkpatrick, L. E. Kirkpatrick, E. P. Campbell, and M. McSherry, for plaintiffs in error.

Sullivan & Gutterson, contra.

NORVAL, J.

The State National Bank of St. Joseph, Missouri, brought an action in the court below against S. J. Lonergan and Edward Royse upon the following promissory note:

"\$2,000. BROKEN BOW, NEBRASKA, February 7, 1891.

"Two months after date, and for value received, we jointly and severally promise to pay to the order of the Central Nebraska National Bank of Broken Bow, Nebraska, two thousand dollars, with interest at the rate of ten per cent per annum from maturity until paid.

"S. J. LONERGAN.

"E. ROYSE."

The petition alleges the execution and delivery of the note to the payee therein named; the transfer and indorsement thereof to plaintiff for value before maturity; that no part of the same has been paid; and that there

is due plaintiff thereon from the defendants the sum of \$2,000 and interest. The defendants filed separate answers, that of Lonergan alleging, in substance:

1. That since the execution and delivery of the note by him to the original payee the same has been altered, without his knowledge or consent, by one Ed Royse signing his name thereto as surety.

2. That Lonergan received no consideration for signing the note; that he executed and delivered it to the Central Nebraska National Bank as an accommodation merely, and that said bank turned over and assigned the note to plaintiff as collateral security to a pre-existing debt due it from the payee.

The defendant Royse sets up in his answer, as a defense, that he signed the note "long after its execution by the defendant S. J. Lonergan, and as an accommodation only, that he never received any consideration for the same, and that plaintiff knew when it received the same that it was wholly without consideration." The reply put in issue every averment in the answers contained, and upon the trial the jury returned a verdict for the plaintiff for the principal sum and interest. A separate motion for a new trial was presented by each defendant, and from an order overruling the same the defendants prosecute separate petitions in error.

Complaint is made of the second instruction given by the court on its own motion, which told the jury, in effect, that there was not such a material alteration of the note as to avoid it as to the defendant Lonergan. The alteration pleaded consisted of the addition of the name of Royse as surety after the delivery of the note to the payee, without Lonergan's knowledge. Such fact, if established by the evidence, would not have the effect to discharge the maker. This principle was distinctly held and applied in *Barnes v. Van Keuren*, 31 Neb., 165, and is adhered to.

We cannot review the evidence in this case, inasmuch as the doctrine attached to the transcript which

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purports to be the bill of exceptions is not authenticated by the clerk of the district court. (*Andres v. Kridler*, 47 Neb., 585, and cases there cited.) For the same reason, we cannot determine whether the court erred in directing the jury that the question of innocent purchaser did not arise in the case. No error appearing upon the face of the record, the judgment is

AFFIRMED.

HERMAN BAACKE ET AL. V. LIZZIE BAACKE ET AL.

FILED DECEMBER 16, 1896. No. 6856.

1. **Wills: REVOCATION: IMPLICATION.** The common-law doctrine that the revocation of a will may be implied from subsequent changes in the condition or circumstances of the testator obtains in this state in so far as it has not been modified by statute.
2. ———: ———: ———. An absolute revocation of a will cannot be implied by law from the obtaining of a divorce from the testator by his wife after the making of the will, the death of one of his children for whom provision was made in the will, and the birth of three children to such deceased child, prior to the testator's death.

ERROR from the district court of Lancaster county.
Tried below before TIBBETS, J. *Affirmed.*

Abbott & Abbott, for plaintiffs in error.

References: *Boudinot v. Bradford*, 2 Yeates [Pa.], 170; *Elyster v. Young*, 3 Yeates [Pa.], 511; *Sneed v. Ewing*, 22 Am. Dec. [Ky.], 52; *Wilson v. Fosket*, 39 Am. Dec. [Mass.], 726; *Negus v. Negus*, 26 Am. Rep. [Ia.], 157; *Graves v. Skeldon*, 15 Am. Dec. [Vt.], 660; *Young's Appeal*, 80 Am. Dec. [Pa.], 518; *Vanorsdall v. Van Deventer*, 51 Barb. [N. Y.], 147; *Heard v. Horton*, 1 Den. [N. Y.], 165.

F. I. Foss and *W. R. Matson*, *contra*.

NORVAL, J.

Carl Baacke, of Lancaster county, on the 16th day of December, 1887, executed a will which disposes of his property in the language following:

"1. After my decease, and after all my debts and funeral expenses have been paid out of my estate, the following heirs shall divide my estate as prescribed in paragraph 2:

"2. My present wife, Dorothea E. Baacke, shall receive as her share, first, such part as may be allowed her by court and law as my wife; secondly, she, Dorothea E. Baacke, shall receive out of my estate twenty-five dollars in cash, in addition. To my son, Fritz Baacke, I bequeath ten (\$10) dollars. To my daughter, Elizabeth, now Mrs. Klepper, I bequeath ten (\$10) dollars. To my son, Herman Baacke, I bequeath ten (\$10) dollars; and the balance of my property I bequeath to the children of my son, Fritz Baacke, viz.: Elizabeth Sophia Margaretha Baacke, born October 24, 1880; Juliana Margaretha Baacke, born January 30, 1882; Maria Dorothea Baacke, born July 4, 1885; but on the condition that they pay off the sums by me specified, and divide the remainder equally between themselves.

"3. In case any one of my heirs shall oppose these conditions, or shall even appeal to law, then his legacy (share) shall consist of five (\$5) dollars; no more."

On February 11, 1893, the testator died, and a few days later T. H. Miller filed in the county court said will, and asked that the same be admitted to probate. Herman Baacke, son of said Carl, on March 3, 1893, presented to the county court a petition, alleging therein that the instrument purporting to be the last will and testament of Carl Baacke had been revoked and annulled, and praying that letters of administration be granted on the estate to one Henry Cramer. Subsequently, Herman Baacke and Elizabeth Klepper, son and daughter of the deceased, pleaded in the county court certain matters

which they claimed amounted to a revocation of the will, and protested against the probate thereof. Upon the hearing the county court found that there had been a revocation of the will, refused to admit the instrument to probate, and appointed Henry Cramer administrator of the estate. An appeal was taken to the district court by the proponent, where the will was ordered to be probated. The contestants prosecute error to this court.

The record shows that Carl Baacke, at the time of the making of his will, had a wife, with whom he was then living; that subsequently she obtained a divorce from him, and her property rights were settled; that after the execution of the will, and prior to the death of the testator, three other children were born to his son Fritz, who survived their grandfather; and that said Fritz died about a year before the death of his father.

The statutory provisions in respect to the revocation of wills are contained in section 132, chapter 23, Compiled Statutes, and are as follows: "No will, nor any part thereof, shall be revoked unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction; or by some other will or codicil, in writing, executed as prescribed in this chapter; or by some other wording, signed, attested, and subscribed in the manner provided in this chapter for the execution of a will; excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." It is not claimed in this case that there has been any express revocation of the will by the testator in any of the modes pointed out in the statute. The sole question is whether the facts already mentioned, namely, the divorce of the wife, the death of the son, Fritz, and the birth to the latter of three children, operated as an implied revocation of the will. It cannot escape notice that the statute quoted provides that no will, or any part of the same, shall be revoked or

annulled by the testator unless he has performed some one of the acts which the legislature has declared shall constitute an express revocation, with the intent to revoke, with a clause saving revocations "implied by law from subsequent changes in the condition or circumstances of the testator." By the language just quoted the common law rule of revocation of wills by implication is retained in this state, except as modified by statute. Undoubtedly certain changes in the condition and circumstances of the testator will operate as a revocation. Thus, a sale of the entire estate devised will have that effect, since the will cannot thereafter take effect on it. (29 Am. & Eng. Ency. of Law, 308, and cases there cited; *Collup v. Smith*, 15 S. E. Rep. [Va.], 584; *Epps v. Dean*, 28 Ga., 533; *Bowen v. Johnson*, 6 Ind., 110.) So, too, a sale of a part of the estate devised will work a revocation *pro tanto*. (*Forney's Estate*, 161 Pa. St., 209; *Borden v. Borden*, 2 R. I., 94; *Graham v. Burch*, 47 Minn., 171.) At common law the will of a woman was revoked by her subsequent marriage, upon the theory that coverture destroyed her testamentary capacity to modify the will, and hence the instrument could not be relied upon as representing her wishes. (1 Jarmin, Wills [5th ed.], 167.) And in some of the states, by express statutory provisions, the same rule obtains. (*Blodgett v. Moore*, 141 Mass., 75; *In re Kaufman's Will*, 131 N. Y., 620; *Stewart v. Powell*, 14 S. W. Rep. [Ky.], 496; *Corker v. Corker*, 87 Cal., 643; *Ellis v. Darden*, 86 Ga., 368.) Under statutes like ours, which have removed most of the disabilities of married women and conferred express power upon them to dispose of their property by will, it has been held that the common law doctrine of the revocation of a will of a woman by her subsequent marriage is abrogated. (*In re Tuller's Will*, 79 Ill., 99; *In re Hunt's Will*, 81 Me., 275; *In re Ward*, 70 Wis., 251; *Noyes v. Southworth*, 55 Mich., 172.) In this state, by section 123, chapter 23, Compiled Statutes, a married woman may devise and dispose of her real and personal estate by a will,

and revoke the will in the same manner as a man may do. At common law the will of an unmarried man was not revoked by his subsequent marriage or the subsequent birth of a child to him, but such marriage and birth conjointly worked a revocation of his will where no provision, in or out of the will, was made for the wife and child. (*Hoitt v. Hoitt*, 63 N. H., 475; *Bowers v. Bowers*, 53 Ind., 430; 4 Kent, Commentaries [13th ed.], 527; *Marston v. Roe*, 8 Ad. & L. [Eng.], 457; *Brady v. Cubitt*, 1 Doug. [Eng.], 31; *Christopher v. Christopher*, 4 Burr. [Eng.], 2182; *Havens v. Van Den Burgh*, 1 Den. [N. Y.], 27; *Baldwin v. Spriggs*, 5 Atl. Rep. [Md.], 295; *Roane v. Hollingshead*, 25 Atl. Rep. [Md.], 307; *Brush v. Wilkins*, 4 Johns. Ch. [N. Y.], 506; *Webb v. Jones*, 36 N. J. Eq., 163; *Belton v. Summer*, 12 So. Rep. [Fla.], 371; *Morton v. Onion*, 45 Vt., 145; *Nutt v. Norton*, 142 Mass., 242.) In some of the states the doctrine of the common law has been changed by legislation. (*Stewart v. Powell*, 14 S. W. Rep. [Ky.], 496; *Gay v. Gay*, 84 Ala., 38; *Rhodes v. Weldy*, 46 O. St., 234; *Holloman v. Copeland*, 10 Ga., 79; *Ware v. Wisner*, 50 Fed. Rep., 310.) Manifestly, decisions based on statutes which expressly provide that a will shall be revoked by either marriage or the birth of a child are not applicable under the legislation of this state. It has been held that the revocation of a will cannot be implied by law from the subsequent acquisition of property by the testator, which is not affected by the will. (*Baldwin v. Spriggs*, 65 Md., 373.) "The more generally accepted view seems to be that a change in the testator's condition and circumstances, as the death of his wife or children, or the objects of his bounty, the increase or decrease of his fortune, or the alienation of his property, will not work a total revocation of the will." (29 Am. & Eng. Ency. of Law, 313, and cases in note 3.)

While our statute recognizes revocations of wills by implication of law, it has not undertaken to designate or specify what subsequent changes in the condition and circumstances of the testator will produce such

revocation, but it is for the court to determine from the facts of each particular case, under the rules and forms of law, whether the testator intended the will to stand notwithstanding the changes in his condition and circumstances. To show that the present case does not fall within the exception of the statute respecting the revocation of wills by implication of law, we have already mentioned certain facts which courts have held to constitute such revocation, and also have instanced some of the changes in the condition of a testator from which a revocation of a will cannot be implied. The doctrine of revocation by implication of law is based upon a presumed alteration of intention arising from the changed condition and circumstances of the testator, or on the presumption that the will would have been different had it been executed under the altered circumstances. An entire revocation by implication of law does not extend to a large number of cases. Change of circumstances may work a partial revocation, and the will in other respects stands as it is written.

No case has been cited, nor has the writer been able to find a single authority, which holds that a subsequent granting of a divorce to the wife of a testator, and a settlement of her property rights, work a revocation. It could no more than revoke the will as to her legacy, and whether it would have that effect in this case it is not necessary now to determine, as the question is not before us.

The death of the testator's son could have no effect, since it was a contingency that must have been contemplated by the testator. Especially is this true in view of our statute (Compiled Statutes, ch. 23, sec. 151), which declares that "when a devise or legacy shall be made to any child or other relation of the testator, and the devisee or legatee shall die before the testator, having issue who shall survive the testator, such issue shall take the estate so given by the will in the same manner as the devisee or legatee would have done if he had survived the testa-

tor, unless a different disposition shall be made or directed by the will." The legacy provided by the will for the testator's son Fritz did not lapse by the death of the latter, as he left several surviving children, who, by virtue of the above statute, would take the same.

But one other ground relied upon for a revocation remains to be considered, and that is the birth of the three children to Fritz Baacke after the making of the will. We have already observed that at common law a revocation will not be implied from the birth of a posthumous child, and clearly, from analogy, the subsequent birth of the grandchildren did not revoke the will. This view is emphasized by the legislation in this state upon the subject. Section 148 of said chapter 23 declares: "When any child shall be born after the making of his parent's will, and no provision shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate, and the share of such child shall be assigned to him as provided by law in case of intestate estate, unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child." The next succeeding section provides: "When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in the preceding section." The succeeding section in the same chapter provides the manner for assigning of the estate in the cases mentioned in the section quoted above. It is obvious from these statutory requirements it was not the intention of the legislature that the omission of a testator to make any provision in his will for a posthumous child, or for the issue of a deceased child, should work an entire revocation of the will, else the legislature would not have provided for the assignment of the estate

in such cases so as to allow such child or issue of a deceased child omitted from the will, as the case may be, to take the share he would have received had the testator died intestate. The statute having expressly declared what effect the subsequent birth of an heir prior to the testator's death would have on a will, none other can be implied. We are aware of no case where the birth of a grandchild after the making of a will is held to operate as a total revocation of the will. We are constrained to hold that there has not been an entire revocation of the will of Carl Baacke by implication of law, and the decree of the lower court allowing and admitting it to be probated should be affirmed.

DECREE AFFIRMED.

STATE OF NEBRASKA, EX REL. JAMES C. DAHLMAN, V.
JOEL A. PIPER, SECRETARY OF STATE.

FILED DECEMBER 16, 1896. No. 8790.

1. **Supreme Court: JURISDICTION.** The original jurisdiction of the supreme court, conferred upon it by the constitution, is confined to "cases relating to the revenue, civil cases in which the state shall be a party, *mandamus*, *quo warranto*, and *habeas corpus*."
2. **Mandamus: PURPOSE OF WRIT.** The writ of *mandamus* can only be invoked to compel the performance of some particular act which the law especially enjoins as a duty resulting from an office, trust, or station. As a preventative remedy it cannot take the place of injunction.
3. ———: ———. *Mandamus* can be resorted to alone for the purpose of compelling action. It is not a proceeding to correct errors.
4. **Elections: SECRETARY OF STATE: APPEAL.** An appeal or proceeding in error will not lie directly to this court to review the decisions of the secretary of state under the Australian ballot law.
5. ———: ———: ———: **NOMINATIONS.** The findings of facts made by the secretary of state in passing upon objections filed against certificates of nomination, if not conclusive, are at least, *prima facie*, right.

State v. Piper.

6. ———: CERTIFICATES OF NOMINATION: OBJECTIONS: HEARING: SECRETARY OF STATE. Under our Australian ballot law the secretary of state, in passing upon objections to nomination certificates, is not confined to mere formal matters relating to such certificates, but may determine from extrinsic evidence whether the candidates therein named were in fact nominated by a convention called and held according to party usages and claiming in good faith to represent a political party which cast the requisite number of votes at the last election. *State v. Allen*, 43 Neb., 651, and *Phelps v. Piper*, 48 Neb., 724, followed.
7. Regularity of Nominating Conventions: SECRETARY OF STATE. It is neither the province of the secretary of state nor the courts to determine which of two rival state conventions of the same party so called and held is entitled to recognition as the regular convention. (*State v. Allen* and *Phelps v. Piper*, *supra*.)
8. ———: ———. Where rival factions of a political party in good faith nominate candidates at conventions called and held in accordance with the usages of the party and certify such nominations to the secretary of state, he will certify to the several county clerks the names of the candidates nominated by each. (*State v. Allen* and *Phelps v. Piper*, *supra*.)

ORIGINAL application for *mandamus* to compel the secretary of state to certify to the county clerks the names of certain persons only as nominees of the democratic party for electors for president and vice president and for other offices. *Writ denied*.

Robert Wheeler, Frederick Shepherd, and Bane & Alt-schuler, for relator.

W. D. McHugh, Robert W. Patrick, and John H. Ames, *contra*.

NORVAL, J.

This was a proceeding to determine the validity of certain nominations for electors for president and vice president and the several state offices, and to require the secretary of state to certify to the several county clerks the names of certain persons, and none others, as nominees of the democratic party for such offices. The cause was submitted upon the pleadings and oral admissions of the parties, without any testimony being adduced,

and a decision announced, denying the relief demanded, just preceding the last general election. To the writer is assigned the duty of preparing an opinion incorporating the views of the court upon the questions involved.

On the 30th day of September, 1896, a certificate of nomination of candidates for electors of president and vice president, and the several state offices, was filed with the secretary of state, signed by Ed P. Smith as chairman and Lee Herdman as secretary, which purported to be a certificate of the nominations made by the democratic party of the state in a regularly called delegated convention, held in the city of Omaha on the 4th day of September, 1896; and on the 7th day of October, 1896, there was filed with the secretary of state an amended and supplemental certificate of said nominations, signed by the same persons who signed the first certificate. No objections to either of the said certificates were ever filed with the secretary of state. On October 8, 1896, one Charles G. Ryan as chairman and Henry Koehler as secretary filed in the office of the secretary of state another certificate of other candidates for the same offices, also purporting to be a certificate of nominations made by the democratic party in a regularly called delegated convention held in the city of Omaha, on the 1st day of October, 1896. Within the time provided by law, James C. Dahlman, an elector of the state, and claiming to be chairman of the democratic state central committee, filed with the secretary of state written objections to this certificate, in substance as follows:

1. That said Charles G. Ryan and Henry Koehler, as chairman and secretary, respectively, are not members of the democratic party of the state, and that no convention of the democratic party was held at the time and place designated in said certificate.

2. That said pretended convention did not represent the democratic party of this state, or any party casting one per cent of the votes in the state at the last general election.

3. That said pretended convention did not represent, and had no authority to act on behalf of the democratic party in this state; that it was wholly unauthorized by the democratic party or any one authorized to act for said party, and was only called and held for the purpose of disorganizing and, as far as possible, injuring and destroying the democratic organization in this state, and, if possible, defeating the election of the regular nominees of said party.

4. That said pretended convention was not recognized by the duly organized democratic national convention, but on the contrary the state convention held on the 4th day of September, 1896, was recognized by the national democratic convention which convened in Chicago on July 7, 1896.

5. That said pretended convention of October 1 did not act in good faith in making nominations and filing said certificate with the secretary of state, but made said nominations and filed said certificate for the purpose of confusing and deceiving the voters in casting their ballots.

6. That the printing of the names set forth in the certificate upon the official and sample ballots will entail upon the state a very heavy additional and unnecessary expense.

7. That the regularly held and duly authorized convention of the democratic party of the state was the one which convened on September 4, 1896.

The secretary of state, upon the hearing of this protest, made findings of facts and rendered a decision overruling said protest and ordering that the names of the nominees mentioned in said certificate of nomination filed on October 8 be certified to the several county clerks as nominees of the democratic party. It was disclosed that two state conventions of the democratic party were held in the year 1896 for the purpose of nominating electors for president and vice president, and a full state ticket to be voted for at the last election, one September 4 and the

other on the 1st day of October, each having assembled by virtue of a call regularly issued in accordance with the practices of the party in such cases from a body claiming to represent the democratic state central committee, and each convention claiming the right to act for and on behalf of the democratic party of the state; that each convention made nominations, and the same were certified in due form to the secretary of state within the time provided by law by the officers of each of said conventions; that the convention which assembled on October 1 met and made nominations in good faith in pursuance of a regular call issued from the democratic state central committee elected by a convention held in 1895, claiming to be the democratic state convention of Nebraska, at which convention Hon. T. J. Mahoney was nominated as candidate for the office of judge of the supreme court, and Hons. John H. Ames and W. S. Ashby as candidates for regents of the State University, and whose names were placed upon the official ballots for the general election held in 1895, as democratic candidates for said respective offices, and at said election said several candidates received more than one per cent of the total vote cast at the said election, and nearly twice as many votes as were polled for other persons named upon said ballot, as democratic candidates.

The respondent in his answer objects to the jurisdiction of this court upon the following grounds:

1. That the proceeding herein is an equitable one for injunction, which this court has no original jurisdiction to entertain.

2. That the matters and things in controversy were passed upon and decided by the secretary of state, and this court has no power to review or modify his findings or decision.

3. That the questions involved are not judicial, but purely political in their character, and consequently subjects in respect of which courts have no jurisdiction.

By section 2 of the article of the constitution of this

state relating to the judicial department, the original jurisdiction of the supreme court is confined to "cases relating to the revenue, civil cases in which the state shall be a party, *mandamus*, *quo warranto*, and *habeas corpus*." There is no escaping the conclusion that this court has no original jurisdiction as a court of equity of causes involving relief solely obtainable by injunction unless it may be in revenue and state cases, of which this is not one, since no such power is conferred upon it by the fundamental law of the state. While it is true the petition prays for an order restraining the respondent from certifying to the several county clerks the names of the nominees of the convention of October 1, it is perfectly plain that merely a temporary injunctive order was asked to be made and enforced until such time as there should be a final hearing of the cause. The ultimate object of this proceeding was to compel the respondent to rescind his decision to certify the names of the nominees of the convention of October 1; in other words, to require the secretary of state to certify to the county clerks of the several counties of the state as nominees for the democratic party the names of the persons placed in nomination at the said convention held on September 4, and none others. In one sense it may be said that the relief demanded involves the perpetual enjoining of the certification to the various county clerks of the names of nominees of the said convention presided over by Charles G. Ryan as chairman and at which Henry Koehler acted as secretary, and if such was the sole nature or purpose of the suit, unquestionably this court would be without jurisdiction to hear or determine the same, for the writ of *mandamus* can only be invoked to compel an inferior tribunal, corporation, board, or person to perform some particular act which the law specially enjoins as a duty resulting from an office, trust, or station, and not merely to prevent it. On the other hand, injunction is wholly to restrain or prohibit the doing of a threatened act. As a preventative remedy simply, the writ of *man-*

damus cannot take the place of an injunction. Applying these principles to the case at bar, as made by the petition, it is believed that the ultimate relief sought is to compel the performance of a particular act by the respondent, which he had declined to do, namely, the certification to the county clerk of each county the names of the candidates mentioned in the certificate of nomination first filed as aforesaid with the secretary of state, as the sole nominees of the democratic party for electors of president and vice president and state offices, which act could not be enforced by injunction. The requiring of an officer by *mandamus* that he do some particular thing in a specified way necessarily implies it shall not be performed in any other mode, but that is not adopting proceedings by *mandamus* to effect the purpose of an injunction. Had the equitable powers of the proper forum been invoked to enjoin the certification to the county clerk of the names of the persons nominated at the convention held on October 1 it is evident that the right to the relief asked in this proceeding could not have been adjudicated therein. This action is not essentially one for injunction, and the first objection to the jurisdiction must be determined adversely to the respondent. It should be remarked before leaving the subject that two similar causes have been entertained by us (*State v. Allen*, 43 Neb., 651, and *Phelps v. Piper*, 48 Neb., 724), although the question of jurisdiction was not then urged upon the attention of the court in either of them.

We come now to the second objection interposed to the jurisdiction, namely, that this court is without authority to review or set aside the decision of the secretary of state in passing upon objections to nomination certificates. It was strenuously insisted in argument that the decision of the officer with whom certificates of nominations are filed, in determining objections thereto, is final and conclusive. Section 11 of our Australian Ballot Law (Compiled Statutes, ch. 26, sec. 136), provides: "All certificates of nomination which are in apparent con-

formity with the provisions of this act shall be deemed to be valid, unless objection thereto shall be duly made in writing within three (3) days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby, addressed to them at their respective places of residence, as given in the certificate of nomination. The officer with whom the original certificate was filed shall in the first instance pass upon the validity of such objection, and his decision shall be final, unless an order shall be made in the matter by a county court, or by a judge of the district court, or by a justice of the supreme court at chambers, on or before the Wednesday preceding the election. Such order may be made summarily upon application of any party interested, and upon such notice as the court or judge may require." A mere reading of the foregoing is sufficient to disclose that it was the purpose of the legislature to give to the secretary of state, or other officer with whom certificates of nomination are required to be filed, the power in the first instance to pass upon all objections to such certificates or nomination papers, and whose decision in the premises is at the furthest limit to be regarded as final, where no "order shall be made in the matter by the county court, or by a judge of the district court, or by a justice of the supreme court at chambers," within the time fixed by statute. If the determination of the secretary of state is absolutely final, it could not anywhere else be questioned. That his decision is not necessarily conclusive follows from the fact that the statute has made provision for reviewing the same, or rather for the determination of the questions by the county court, or by a judge of the district or supreme court. Whether that portion of the act is valid which attempts to confer power in such matters upon a judge of this court at chambers has been seriously doubted,—so much so that the present judges have not entertained such jurisdiction. The rulings of the secretary of state could be deemed final only when not

reviewed by the court or officer authorized by the statute so to do, and when he properly determines such questions alone as he is empowered by law to decide; that is, when he has proceeded legally and within his jurisdiction. If he has acted illegally, or without jurisdiction, his decision is without validity. Suppose a certificate of nomination should be filed after the statutory period, and he should determine to certify the names of the nominees therein mentioned; his action would not be conclusive or binding. Or should he refuse to certify the names of the candidates mentioned in a certificate in due form, who were properly nominated, and against such certificate no protest had been filed, his action would not be final, even though no order had been made in the premises by the court or judge mentioned in the law, and most assuredly *mandamus* would lie to compel him to certify the names of such nominees to the county clerks, because the duty is purely a ministerial one enjoined by law, involving no discretion. Again, should the secretary of state determine which of two rival conventions of the same political party was the regular convention, where both were called and held in accordance with the usages of the party, and each made nominations in good faith and certified the same in due form to him within the statutory time, and should certify the names of one set of candidates and decline to certify the other, *mandamus* could be invoked against him. His decision would not be final should he, without a hearing of objections properly made and filed to a certificate of nomination, determine that the names of the candidates therein mentioned should or should not appear upon the official ballot. There are many other instances which might be given where *mandamus* would be the appropriate proceeding to compel the secretary of state to act. Clearly it was not the purpose of the election law to take away the right theretofore conferred upon the courts to compel by *mandamus* the performance by an officer of a purely ministerial duty enjoined by law.

It is very evident an appeal or proceeding in error will

not lie directly to this court to review the decisions of the secretary of state under the Australian Ballot Act, for two reasons: First, no provision is made therefor by the law in question, or by any other statute; and in the next place, the appellate jurisdiction of this court is confined to a review of the judgments and orders made by the several district courts of the state. Neither error nor appeal can be prosecuted from the decision of any other court or tribunal directly to this court. (*Cleghorn v. Waterman*, 16 Neb., 225.)

While upon the argument the case was discussed by counsel for respondent partly as if this was a proceeding in error to review the action of the secretary of state, it is obvious that the petition is essentially an application for a writ of *mandamus*, and must be so regarded. The constitution has conferred original jurisdiction upon the supreme court in *mandamus*, hence the case is not one of the class without the jurisdiction of this court, but within it. Whether *mandamus* should issue in this particular case is another question,—one which will be determined later on. *Mandamus* can be resorted to alone for the purpose of compelling action; that is, the performance of a duty enjoined by law. It is not a proceeding to correct errors (*State v. Nemaha County*, 10 Neb., 32; *State v. Powell*, 10 Neb., 48; *State v. Kinkaid*, 23 Neb., 641; *McGee v. State*, 32 Neb., 149), so that errors, if any, committed by the respondent upon the hearing, or in his decisions, are not available here. Our inquiry is confined alone to the question whether the respondent has failed to discharge any ministerial act which the statute requires him to perform.

It appears from the findings of fact made by the secretary of state in passing upon the objections filed against the certificate of nomination that two rival factions of the democratic party in this state held conventions called in accordance with the usages of the party, and each in good faith nominated candidates for electors of president and vice president, as well as state offices, which nominations were duly certified to him; that each of said con-

ventions claimed to represent the democratic party of the state; "that the said convention of October 1, 1896, was held openly, and publicly announced in the public press, and that the fact that the said convention was to be held was a matter of public knowledge and notoriety, and that said convention assembled openly and publicly in pursuance of said call, and was comprised of delegates duly accredited to said convention from the various senatorial districts of the state, and that all its acts were open and public, and in good faith." The above findings were pleaded by the respondent in his answer, and, not having been controverted on the hearing, are at least *prima facie* correct, if not conclusive. When so regarded, what was the duty of the secretary of state? Was he required to decide between said rival factions of the party and certify to the several county clerks the names of the nominees of one of the conventions alone as the candidates of the democratic party? These precise questions have been already twice adjudicated by this court, and that, too, adversely to the contention of the relator herein, in a controversy involving the right of each faction of the democratic party in this state, now concerned in this litigation, to representation upon the official ballot. A reference to those cases will not be inappropriate.

State v. Allen, 43 Neb., 651, was an application for *mandamus* to compel the secretary of state to certify to the county clerks the names of the relators therein as nominees of the democratic party for the several state offices to be filled at the election to be held on the 6th day of November, 1894. Two certificates of nomination in due form had been filed with the secretary of state, each containing the names of different persons as nominees of the democratic party for state offices. A protest was filed against each certificate. That against the certificate containing relators' names was sustained by the secretary of state, and the other protest was overruled by him. The writ was denied because the claim of the relators rested alone upon the certificate of nomination, it not appearing from the

record that they were nominated by a convention claiming to represent the democratic party. Among others, the following legal propositions were determined by the court in that case: 1. The secretary of state in passing upon objections to nomination certificates is not confined to mere formal matters, but may determine from extrinsic evidence whether the candidates were in fact nominated by a convention claiming to represent a party which cast the requisite number of votes at the last preceding election. 2. That it was not the province of such officer to determine which of the two rival state conventions of the same party is entitled to recognition as the regular convention, but it is his duty to certify to the county clerks the names of all the candidates who were nominated by each convention according to the usage of such party. The same principles were held and applied in the opinion of RAGAN, C., in *Phelps v. Piper*, 48 Neb., 724; and further, that the question as to which one of the two factions of a political party has the right to act for the party, it is not the province of the courts to determine, since the question is a political, and not a judicial, one. To the same effect are *People v. District Court*, 18 Colo., 26, *Shields v. Jacob*, 88 Mich., 164.

Decisions of other states which hold that courts will determine which faction of a political organization is the regular one, and entitled to recognition, were, for the most part, based upon statutes materially different from ours, and therefore clearly distinguishable. Thus, where a statute authorizes a political party to select one or more of the election officers, and such party is divided into factions, of necessity the court, to prevent disorder and confusion, may decide which faction represents the regular organization. So, too, where the ballot law requires the names of candidates of political parties to be arranged and printed on the official ballot in a separate group, and it is made the duty of the election officer in arranging the ballot to place the ticket of the party having the greatest number of votes at the last preceding

election first on the ballot, and that the position of other tickets should be controlled relatively by the same rule, it is obvious that under such a law it is necessary to decide between rival factions of the same party, in order to determine the position of the tickets upon the ballot. But where, as under our ballot law, the reason for the rule does not exist, the rule itself does not obtain. The construction adopted by this court in its prior adjudications, and followed in this, is in consonance with the spirit and object of our election laws, since it affords the voter the greater liberty in casting his ballot.

The views expressed dispose of all the grounds set forth in the protest filed by the relator with the secretary of state excepting the fourth and sixth, which we will now briefly notice in their order. By the fourth objection it was sought to raise the question whether the decision of the national convention of a political party recognizing one faction of its party in a state is conclusive, and not reviewable by the court. Unfortunately for the relator such question is not before us, since the averment in the petition for the writ and in the protest relating thereto were put in issue by the answer and return of the respondent, and no evidence was introduced upon that subject. The sixth ground of objection is without merit for two reasons: First, the printing of the names of the nominees upon the official and sample ballot will entail no additional expense on the state, because it is not required to pay the cost of printing the ballots; second, the additional expense entailed by the printing of a candidate's name upon the ballot is no valid reason for excluding his name therefrom.

It having been disclosed by the record in this case that nominations for the same offices were in fact made by each of the two rival conventions of the democratic party of the state, called and held in accordance with the usages of the party, and each claiming in good faith to represent a political organization which cast one per cent of the total vote at the general election of 1895, it was

not the province of the secretary of state, nor is it of this court, to determine which convention was the regular one; but it was the duty of the secretary of state to certify the names of the nominees of both conventions to the county clerks.

WRIT DENIED.

IRVINE and RYAN, CC., not sitting.

RAGAN, C., dissenting.

I agree to the conclusion reached in this case, viz., that the writ asked for should be denied; but I do not agree to the reasons given for that conclusion. No statute of this state has conferred any authority on this court to review a decision made by the secretary of state, as to what nominations certified to him shall be placed on the official ballot; nor does the fact that the constitution invests this court with original jurisdiction in *mandamus* cases confer any authority on the court to control the discretion of the secretary of state, in this or any other case. The legislature has seen fit to provide that the secretary of state shall hear and decide all objections to nominations certified to him; and that "his decision shall be final unless an order shall be made in the matter by a county court or by a judge of the district court, or by a justice of the supreme court at chambers." (Compiled Statutes, ch. 26, sec. 136.) In the matter involved here no order has been made by a county court, a judge of the district court, or a justice of the supreme court, and if the statute is to be followed, the decision of the secretary of state is final; and "final," in judicial parlance, means that question is ended; decided; set at rest forever. It was quite as competent for the legislature to leave the decision of such matters as those involved here to the secretary of state as to any other person, officer, board, or tribunal, or to the supreme court. The matters in litigation here are not judicial. They are purely administrative or political in their nature, and neither the constitution nor the statute makes it the duty of this court to

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pass upon them; nor has the court either original or appellate jurisdiction to say that the decision made by the secretary of state is either right or wrong. In my opinion the writ should be denied on the ground that this court has no jurisdiction in the premises.

STATE OF NEBRASKA, EX REL. JAMES C. DAHLMAN ET AL.,
V. JOEL A. PIPER, SECRETARY OF STATE.

FILED DECEMBER 16, 1896. No. 8791.

Regularity of Nominating Conventions: DUTIES OF SECRETARY OF STATE: MANDAMUS. The decision in this case is ruled by *State v. Piper*, 50 Neb., 25.

ORIGINAL application for *mandamus*. *Writ denied.*

Robert Wheeler, Frederick Shepherd, and Bane & Altschuler, for relators.

John H. Ames, *contra*.

NORVAL, J.

This was an application for *mandamus* against the secretary of state to determine the validity of the nomination of R. S. Proudfit, and the right to have his name printed upon the official ballot as the nominee of the democratic party for congress in the fifth congressional district in this state. Two certificates of nomination of candidates for said office were filed with the secretary of state, both upon their face in apparent conformity with the requirements of the election law, and each purporting to be a certificate of nomination by the democratic party of that congressional district, in one of which R. D. Sutherland was named as the candidate, and the other certificate R. S. Proudfit was stated to be the nominee.

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The respondent overruled the objections filed to the last named certificate. The facts and the questions involved are identical with those in *State v. Piper*, 50 Neb., 25, and following the decision therein, the writ must be denied.

WRIT DENIED.

IRVINE and RYAN, CC., not sitting.

STATE OF NEBRASKA, EX REL. C. D. CASPER, v. JOEL A. PIPER, SECRETARY OF STATE.

FILED DECEMBER 16, 1896. No. 8792.

Elections: CERTIFICATES OF NOMINATION: OBJECTIONS: TIME. The provisions of the statute (Compiled Statutes, ch. 26, sec. 136) known as the "Australian Ballot Law," requiring objections to a certificate of nomination of candidates for office to be filed within three days after the filing of such certificate, are mandatory, and must be strictly followed, else said certificate, if in conformity with law, will be deemed valid.

ORIGINAL application for mandamus. Writ denied.

Robert Wheeler, Frederick Shepherd, and Bane & Altschuler, for relator.

John H. Ames, contra.

NORVAL, J.

This was an application by C. D. Casper, as chairman of the democratic congressional committee for the fourth congressional district, for a writ of *mandamus* to determine the right of the secretary of state to certify to the several county clerks of said district the name of R. E. Dunphy as the democratic nominee for congress from such district. Like the two other cases decided herewith, the controversy grows out of the fact that two rival

factions of the democratic party have made and filed separate certificates of nomination for said office. The validity of the nomination of Mr. Dunphy alone is assailed in this proceeding. All the questions involved, except one, were decided in *State v. Piper*, 50 Neb., 25. One subject presented by the application for the writ requires notice, and that is whether the relator is in any position to question the nomination of Mr. Dunphy, or the right to have his name appear upon the official ballot as the democratic nominee from the fourth congressional district. The application alleges that on the 1st day of October, 1896, the certificate of nomination of R. E. Dunphy as the democratic nominee for congressman for that district was filed in the office of secretary of state; that on the 12th day of the same month the relator filed his protest and objections to said certificate of nomination; and that the respondent overruled said objections and decided that the name of Mr. Dunphy was entitled to have place upon the official and sample ballots. Section 11 of the Australian Ballot Law (Compiled Statutes, ch. 26, sec. 136) declares: "All certificates of nomination which are in apparent conformity with the provisions of this act shall be deemed to be valid, unless objection thereto shall be duly made in writing within three (3) days after the filing of the same," etc. The statute requires that objections to certificates of nominations shall be filed within three days after such certificates are filed. This provision is mandatory and must be strictly followed, else the certificate of nomination, if in due and legal form, shall be regarded as valid. (*State v. Norris*, 37 Neb., 299; *In re Cuddeback*, 39 N. Y. Supp., 388; *Price v. Lush*, 10 Mont., 61; *Griffin v. Dingley*, 46 Pac. Rep. [Cal.], 457; *Nomination of Van Storch*, 2 Pa. Dist., 7.) The application or petition in this case shows that the objections of the relator to Mr. Dunphy's nomination were not filed until the eleventh day after the filing of his nomination certificate, and it was not alleged that either the relator or any one else, at any

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other time, filed another protest against such certificate, or that the same was defective in form or substance. It was, therefore, the duty of the respondent to certify the name of Mr. Dunphy to the several county clerks within the fourth congressional district as the nominee of the democratic party.

WRIT DENIED.

IRVINE and RYAN, CC., not sitting.

RAGAN, C.

I concur in the conclusion reached only.

STATE OF NEBRASKA, EX REL. FRANK L. ROSE, v. JOEL
A. PIPER, SECRETARY OF STATE.

FILED DECEMBER 16, 1896. No. 8794.

1. **Elections: CERTIFICATES OF NOMINATION: OBJECTIONS: DUTY OF SECRETARY OF STATE.** The secretary of state in passing upon objections to a certificate of nomination for a public office is not confined alone to the consideration of objections as to matters of form, but has the power to decide from extrinsic evidence whether the candidate named in such certificate was in fact nominated by a convention called and held in accordance with the precedents and usages of a political party which cast one per centum of the votes of the state at the last general election, or by a faction in good faith claiming to represent a party casting such a per centum of the vote of the state.
2. ———: ———: ———: ———. Upon the facts in this case it was held that the secretary of state properly refused to certify to the county clerks the names of certain candidates for office.

ORIGINAL application for *mandamus* to compel the secretary of state to certify to the county clerks the names of certain persons as republican nominees for certain offices. *Writ denied.*

E. H. Wooley, W. M. Morning, and C. S. Rainbolt, for relator.

John H. Ames, contra.

NORVAL, J.

This was an application by the state, on the relation of Frank L. Rose, for a peremptory writ of *mandamus* to compel the certification by respondent, as secretary of state, to the county clerks of the names of certain persons as republican nominees for electors of president and vice president and the several state offices. A submission was taken upon the pleadings alone, consisting of the application and the answer thereto of the respondent, shortly prior to the last general election, and an oral decision was then announced, the preparation of a written opinion having been delayed until now. For a proper understanding of the questions involved it is not deemed necessary to set out the pleadings; moreover, to do so would extend this opinion beyond reasonable limits. It should be stated here that after the submission a reply to the answer was filed without leave or consent of the court being first had and obtained, and it was accordingly eliminated from the record. The answer, *inter alia*, raised the same objections to the jurisdiction of the court which were presented and determined in *State v. Piper*, 50 Neb., 25, and which must be overruled for the reasons stated in the opinion therein filed.

It clearly appears that at a state convention of the republican party of this state, duly and regularly held in accordance with the practices of the party in such cases, and pursuant to a call executed and published by the chairman and secretary of its state central committee in obedience to an order by said committee, which convention was composed of more than 900 delegates and representing all the organized counties in the state, a full ticket of candidates for all the state offices and presidential electors to be voted at the general election in 1896 was nominated; that a certificate of said nominations, made out in conformity with law, was executed by

George W. Collins and H. M. Wells, respectively the chairman and secretary of said convention, and in due time filed in the office of the respondent, as secretary of state, and that no protest or objection to said certificate or to said nominations was ever presented or filed with him. Subsequently, and on the 7th day of October, 1896, there was filed with the respondent a certificate of nomination of other persons as candidates for the same offices, signed by F. L. Rose as chairman and R. A. Williams as secretary, purporting to be a certificate of nominations made by a convention of the republican party of the state, hereafter called the "Rose convention," held in the city of Lincoln on the 6th day of October, 1896, reciting and stating that said convention was held "pursuant to a call regularly issued for a Nebraska state republican mass convention, which state convention was composed of delegates and legal representatives duly qualified and chosen as such, and the legal representatives of the qualified electors and residents of the state of Nebraska representing the republican party in said state, which said political party, at the holding of the last election before the holding of such convention, polled more than one per cent of the entire vote cast in the state." On October 9, 1896, John P. Maule, a resident and elector of the state, filed with the respondent written objections to said last mentioned certificate of nomination and to the nominees therein named, and thereafter, upon due notice having been given to all persons interested therein, a hearing was had upon said protest before the respondent, who, upon the consideration of the evidence adduced by the respective parties, sustained said objections and declined to certify to the various county clerks of the state to be printed upon the official ballots the names of the persons mentioned in the Rose certificate. Relator being dissatisfied with this ruling and decision commenced this proceeding.

The secretary of state, at the time of his decision, made findings of fact and conclusions of law, which are set

forth in full in his answer herein, and which said findings he alleges are in all respects true. The findings are as follows:

"First—There was not held in said city of Lincoln on the 6th day of October, 1896, or at any time in said year after the first day of July, any convention composed of delegates and legal representatives duly qualified and chosen as such and the legal representatives of the qualified electors and residents of the state of Nebraska representing the republican party in said state.

"Second—I find that on the 3d day of October, 1896, one F. L. Rose, a private individual residing at Lincoln, Nebraska, but not having, or claiming to have, any official relation as committeeman or otherwise with the republican party in said state, caused to be published in the *Omaha World-Herald*, a newspaper published at Omaha, Nebraska, and in the *Evening Post*, a newspaper published at Lincoln, Nebraska, a notice, of which the following is a copy:

" 'LINCOLN, NEB., Oct. 3, 1896.

" 'We, the republicans of the state of Nebraska, reaffirm our allegiance to the time-honored principles of our party as enunciated by John C. Fremont, Abraham Lincoln, and its illustrious framers, and exemplified by the public life and utterances of James A. Garfield, John A. Logan, James G. Blaine, and other great leaders. To the end that the great principles which called for the grand old party of freedom and liberty shall not perish forever from the face of the earth, and that chattel slavery having been abolished by our party, a more galling subserviency to the money plutocracy of foreign nations and their tory allies on American soil, aided and abetted by corporate greed, shall not forever destroy a government of the people, for the people, and by the people, we invite the co-operation of all republicans who adhere to the original principles of the party to convene in mass convention at the city of Lincoln, at 10 o'clock A. M., on Tuesday, October 6, A. D. 1896, for the purpose of placing

in nomination candidates for the following offices to be voted for at the coming election to be held Tuesday, November 3, 1896:

“ ‘One governor,

“ ‘One lieutenant governor,

“ ‘One secretary of state,

“ ‘One auditor of public accounts,

“ ‘One treasurer,

“ ‘One attorney general,

“ ‘One superintendent of public instruction,

“ ‘One commissioner of public lands and buildings,

“ ‘One supreme judge, contingent four years,

“ ‘One supreme judge, contingent two years,

“ ‘One regent state university,

“ ‘Eight presidential electors,

“ ‘And for the transaction of such other business as may properly come before the convention.

“ ‘We hereby instruct the chairman of this conference to publish this call.

F. L. ROSE,

“ ‘*Chairman.*’

“Third—I find that between the hours of 10 o'clock A. M. and 2 o'clock P. M., on the 6th day of October, 1896, there assembled in a private room on the fourth floor of the Lincoln Hotel, in Lincoln, Nebraska, a number of persons, variously estimated at from thirty-five to fifty, but not exceeding the latter number; that those persons nor any of them, were not chosen or delegated to attend said meeting or any meeting on said day by any political organization or claimed or pretended political organization whatever, or by any person or persons acting or claiming or pretending to act by or under the authority of any political party, political organization, or political committee or committeeman, and that said assemblage was wholly voluntary and self-constituted; that the persons in charge of said room and in the management of said meeting actively concealed the place of said assemblage from the knowledge of the republican voters of said state and city, and from the public generally, and allowed

information thereof to be given only to such persons as were actually present thereat, and that at said meeting so held, and not elsewhere or otherwise, were the several persons, or any of them, mentioned in said purported certificate of nomination attempted or pretended to be or to have been put in nomination as candidates for any of said offices.

“Fourth—I find that during the entire time of the existence of said assemblage and for several hours prior thereto a large concourse of persons, several hundred in number, professing to be members of the republican party in said state and in sympathy with the sentiments expressed in said published notice and of the persons therein named, and all or nearly all of whom are and have been for many years actively affiliated with said republican party, were making active and diligent search and inquiry of the proprietors and managers of the theaters and public halls and of the clerks and proprietors of the several hotels in said city, and at the place of business of said Rose, for the purpose of ascertaining if possible the whereabouts of said Rose and the time and place of the holding or assembling of any meeting or convention pursuant to said notice; and that the persons making such inquiries and the public generally, except such persons as were in fact present at said assemblage, were unable to ascertain the place or time of said assemblage and remained ignorant thereof until after the same had dispersed.

“Fifth—I find that between the hours of 10 o'clock A. M. and 2 o'clock P. M., on said 6th day of October, 1896, the concourse of persons mentioned in the last preceding paragraph of these findings, being unable to ascertain the place of said assemblage, themselves assembled to the number of several hundred, but to what exact number I have been unable to ascertain, at the Capital Hotel, in the city of Lincoln, Nebraska, and organized, by the choice of Charles H. Gere, of Lincoln, Nebraska, as chairman, and Samuel E. Low, of Lincoln, Nebraska, as sec-

retary of said meeting, and thereupon proceeded to nominate a candidate for each of the several offices to be voted for at said general election to be held in this state on the 3d day of November, 1896. And thereafter, and on the said day of October, 1896, the said Charles H. Gere as such chairman and the said Samuel E. Low as such secretary duly made, executed, and filed in this office, in due and apparent conformity with law, a certificate of the nominations of all of said candidates so nominated by said assemblage of voters at the said Capital Hotel on said day, and that no objection or protest to said certificate of nomination has ever been made in writing or filed in this office.

“Sixth—I find that according to the customs and usages of the republican party in the state of Nebraska, no convention thereof could have been or can be regularly called or held, except upon the call or proclamation of the chairman and secretary of the republican state central committee of said party, they being first duly authorized in that behalf by a resolution of said committee, and that no such call has been made or authorized for the holding of a state convention of said party in said state on the 6th day of October, 1896.

“Seventh—I find that the said assemblage of persons in a room on the fourth floor of the Lincoln Hotel on the 6th day of October, 1896, was not attended by or composed of so many persons as one per centum of the entire vote polled in the said state at the last election before said date, nor did they represent any political party or any political organization or association which at the last election in said state before said date polled so many as one per centum of the entire vote in said state, and that of said assemblage the said F. L. Rose was chosen and acted as chairman, and the said R. A. Williams was chosen and acted as secretary, and that said persons were not either of them chosen as chairman or secretary of any other meeting or assemblage held in said city of Lincoln on said day.”

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Conclusions of law: "I find (1) that the said assemblage mentioned in the last preceding paragraph numbered seventh was not such an assemblage of voters, convention, or primary meeting as was permitted by law to nominate candidates for office to be voted for at the general election in said state to be held on the 3d day of November, 1896; (2) that the said purported certificate of nominations signed by the said F. L. Rose as chairman and R. A. Williams as secretary is fraudulent and void, and the names of none of the persons therein contained ought to be certified to the several county clerks or printed on the official ballots to be used at said election to be held on the 3d day of November, 1896, and, in conclusion, I sustain the said written objections to said purported certificate of nominations and order that the names contained therein be not certified to the several county clerks of this state or printed upon the official ballots to be used or voted at said election."

The foregoing findings of fact must, for the purposes of this case, be treated as true, since they were not controverted on the hearing by evidence or otherwise. (*State v. Piper, supra.*)

It was contended by counsel for relator, in argument, that the respondent exceeded his authority in holding invalid the Rose certificate. The duties and powers of the secretary of state in passing upon objections to certificates of nomination, in view of the previous decisions of this court upon the subject, ought not longer to be misunderstood. It is the settled law of this state that such officer, in the consideration of objections, is not confined to mere formal matters relating to certificates, but that the Australian Ballot Law contemplates that he may ascertain and decide from extrinsic evidence whether the candidates named in the certificate were in fact placed in nomination by a convention or assemblage of voters or delegates called and held according to usages of the party and claiming in good faith to represent a political organization which cast the requisite number of

votes at the last election. Furthermore, that he has no power to decide which of two rival conventions thus called and held is the regular convention of the party, but where two factions of a party make nominations by regularly called conventions, it is his duty to certify the names of the candidates certified to him in due form by the officers of either convention. (*State v. Allen*, 43 Neb., 651; *Phelps v. Piper*, 48 Neb., 724; *State v. Piper*, 50 Neb., 25.)

It is insisted that the case at bar is controlled by the last two authorities cited. If the facts in the case were the same, the conclusion would be irresistible that the secretary should have certified the nominees mentioned in the Rose certificate. But they are not alike, and the facts herein are plainly distinguishable from those in the two decisions mentioned. In each of those cases two conventions were regularly called and held in conformity with party precedent and usage, by rival factions of the democratic party, and nominations made, each branch of the party having an organization and claiming in good faith to represent the party. Upon those facts it was properly ruled that it was the duty of the secretary of state to certify both sets of candidates, since both conventions had apparently the same right to make nominations as if they had represented different political parties, and it was not the province of the secretary of state to decide between them. In the case under consideration, so far as disclosed from this record, relator's claim of validity of the nominations made by the alleged Rose convention is based upon the certificate of nomination alone, it not having been disclosed that said convention was called according to party usages, or by any person or body having the right to represent the republican party of the state, or that the convention itself was composed of persons who had been chosen by said party, or a faction thereof, as its delegates and representatives. On the contrary, it appears that the call for the alleged convention was issued by a person who had no authority

to represent said party in that behalf; that only three days' notice of the time when the convention was to be held was given, and that it omitted to designate the building in which it was to convene; that the precise place of meeting was concealed from the knowledge of the republican voters of the state, as well as the general public, notwithstanding diligent inquiry and search for the place of holding the convention was made by several hundred persons claiming to be republicans and in sympathy with the sentiments expressed in the published convention call; that said alleged nominations were made in a private room in one of the hotels of the city of Lincoln, by an assemblage of persons not to exceed fifty in number, none of whom had been chosen or delegated to attend thereat by any political party or organization; and that the certificate of nomination purports to emanate from a delegate convention, while the call was for a mass convention,—in brief, that the candidates named in the Rose convention call were not nominated by a convention or assemblage of republican voters brought into existence by the action of the machinery of the republican party of the state empowered to call conventions, or by the authority of any considerable number of republican electors, but in pursuance of a call made by a person who did not represent, or claim to represent, the regularly constituted organization. In the light of the facts disclosed by this record, the names of the nominees of said convention so called and clandestinely held were not entitled to be printed upon the official ballots, and to so hold is not deciding between regularly called rival conventions, nor does this conclusion conflict with any prior adjudication of this court, but is in perfect harmony therewith. If said nominations are legal and entitled to recognition, then our Australian Ballot Law was wrongly entitled. Instead of being "An act to promote the independence of voters at public elections," etc., it should have been designated "An act to promote the deception of voters at public elections." Although the courts will not de-

cide which of two rival conventions is the regular convention of the party, when both were called and held in accordance with the precedents and usages of the party, and each claiming in good faith to represent the party, since that is not a subject of judicial inquiry, yet the courts, in a proper case, will determine whether nominations were in fact made by a *de facto* convention of the party, even though to do so may lead to an investigation of political methods. As was said by the supreme court of Missouri (*State v. Lesueur*, 103 Mo., 253): "The same considerations which should induce courts of justice to maintain the purity of the ballot-box, when the final vote is taken, should equally operate with them to promote honesty and prevent and condemn fraud when a preliminary vote is taken or a nominating convention held. There can be no difference in principle in its application to the various situations mentioned. And though it is said that 'the Decalogue has no place in politics,' yet when the tribunals of the country are appealed to in matters having political complexion and bearing; when once they acquire jurisdiction in a proper way of such matters, they will administer justice, promote honest dealing, and condemn fraud precisely as they do when administering the law in cases sounding in damages or sounding in contract."

The conclusion we have reached finds some support in the judicial decisions of other courts. *State v. Weir*, 31 Pac. Rep. [Wash.], 417, was an application for a *mandamus* to compel the secretary of state to certify the name of N. H. Bloomfield as the regular nominee of the republican party for the office of superior judge for Clarke, Cowlitz, and Skamania counties. Delegates from two of the counties, duly chosen, nine in number, met together and placed in nomination Mr. Bloomfield, and certified such nomination to the secretary of state. The thirteen delegates who had been duly chosen by the republican party of the other county held a judicial convention and nominated one A. L. Miller as a candidate for superior

judge for all of the three counties for which a judge was to be elected, whose nomination was duly certified to the secretary of state. The court held, under provisions of a ballot law relating to nominations for public office the same as ours, that Bloomfield was not the nominee of the republican party for said office, and denied the writ. The court, in the opinion, say: "The plain intent of said section, when examined in the light of all the other sections upon the subject, makes it perfectly clear that the primary meeting or convention must be by or on behalf of the entire body of voters of the respective party who are to be allowed to vote at the election of the officers therein nominated." To the same effect is *State v. Rotwitt*, 46 Pac. Rep. [Mont.], 370. In *Baker v. Board of Election Commissioners*, 68 N. W. Rep. [Mich.], 752, it appears that the regularly called democratic state convention met at Bay City, Michigan, on August 25, 1896, and upon the same day and in the same city the convention of the people's party and union silver party convened. By an amicable arrangement the three conventions sat as one body and nominated a joint state and electoral ticket, which it was agreed would be called the "Democratic People's Union Silver Ticket," the people's party and the union silver party being together accorded the same number of votes as the democratic party. Subsequently, a mass convention composed wholly of democrats was held at Lansing, at which candidates for state offices and presidential electors were placed in nomination as a democratic ticket, but which last convention was not called or held under the auspices of any previous democratic state organization. It was held that neither of the tickets so nominated was to be considered as the regular democratic ticket, and, as such, entitled to the place on the ballot belonging to the ticket of the democratic party. Both upon principle and authority we are satisfied that the secretary rightly determined that the names of the nominees of the so called Rose convention were not entitled to appear upon the official ballot.

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Two other questions were argued at the hearing, namely: First—The Rose certificate is insufficient on its face, because it purported to come from a delegate convention when the call was for a mass convention. Second—Under our Australian Ballot Law, nominations for state offices cannot be made by a mass convention composed of less than 500 voters, or one per centum of the total vote of the state cast at the preceding general election. The conclusion reached makes it unnecessary to express our views upon either of these propositions, and we refrain from doing so, notwithstanding, at the hearing, the majority of the court was of the opinion, and so announced, that the second proposition above stated was the proper interpretation of the law.

WRIT DENIED.

IRVINE and RYAN, CC., not sitting.

RAGAN, C.

I concur in the conclusion reached only.

E. C. ACKERMAN AND A. M. HEINTZE, APPELLEES, v. G. A. ACKERMAN ET AL., APPELLEES, AND CARPENTER PAPER COMPANY ET AL., APPELLANTS.

FILED DECEMBER 16, 1896. No. 7214.

1. **Attachment: LEVY: RECEIVER.** Even though a sheriff in possession of personal property for its safe keeping pending an application for a receiver is to be deemed to be a receiver, a proposition not determined, the levy of an attachment on a portion of such property without leave of the court is not void in the absence of any objection by the sheriff as custodian, or by the receiver, on that ground.
2. **Chattel Mortgages: REGISTRATION.** Where the evidence showed affirmatively that a chattel mortgage was withheld from record more than a month in pursuance of an agreement so to continue to withhold it unless some change or difficulty should occur in the business affairs of the mortgagor which would make it necessary

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to protect the interest of the mortgagee, and the mortgagor was to notify the mortgagee of any financial difficulty the mortgagor might meet with, upon which notification the mortgage was to be filed, *held*, to sufficiently establish a fraudulent purpose of both parties to the mortgage such as to render it invalid and void as to creditors of the mortgagor.

3. **Receivers: SALE: TIME.** A decree required a receiver to sell the assets of an insolvent firm on a day named. The receiver, without other authority, advertised and sold such assets after the date fixed by the decree. *Held*, That such sale was absolutely void, and not merely irregular in such a sense that a confirmation over objections could render it valid.

APPEAL from the district court of Douglas county.
Heard below before SCOTT, J. *Reversed*.

L. D. Holmes and Byron G. Burbank, for appellants.

Breckenridge & Breckenridge, Cavanagh, Thomas & McGilton, Duffie, Crane & Van Dusen, Horton & Blackburn, Schomp & Corson, Isaac E. Congdon, J. M. Woolworth, and Rich, O'Neill & Sears, contra.

RYAN, C.

On the 10th day of August, 1893, E. C. Ackerman and A. M. Heintze began this action against G. A. Ackerman in the district court of Douglas county. These plaintiffs alleged that in 1887 they, with the defendant, had entered into partnership for the purpose of conducting a general printing, engraving, and lithographing business in the city of Omaha; that the defendant was the financial manager for the firm; that its business had been, until about January 1, 1893, conducted profitably, but that thereafter, as shown by its books, its operations were at a great loss, as plaintiffs alleged, of \$1,000 per month. For the purpose of accounting for this condition of affairs it was further alleged that the defendant had injudiciously purchased supplies and machinery and had appropriated to his own use \$6,000 of the assets of the firm without the knowledge of either plaintiff, and that, upon the discovery by the plaintiffs, on January 1, 1893, of

this misappropriation the defendant had promised to make restitution to the firm, but had wholly failed to perform this promise, and that at the time of filing the petition he was insolvent, and was refusing, upon demand, to make an accounting of the affairs of the aforesaid firm. It was therefore charged by plaintiffs that the firm was, at the time of the commencement of this action, unable to meet its obligations and was insolvent; that its indebtedness was a large amount, as to which plaintiffs had no means of knowledge, but charged the fact to be that it was at least \$45,000, and that the assets were reasonably of the value of \$65,000, but that, if they were sold at a sacrifice, these assets would be wholly inadequate to the payment of the aforesaid indebtedness. The eleventh paragraph and the prayer of the petition which followed immediately thereafter was as follows:

"11. Plaintiffs further show that unless the property of said copartnership is preserved intact and saved, great loss will ensue to the copartners and their creditors and the assets of said firm sacrificed.

"Plaintiffs therefore pray that an accounting may be ordered between the parties to this action and the said firm dissolved, and that a receiver be appointed by the court to take charge of all the property of said firm and collect the debts due to the said firm and hold the said property and assets and money collected subject to the further order of the court; and plaintiffs further pray that pending the application for a receiver herein the sheriff of Douglas county be ordered to take charge of all the assets and business of said firm of Ackerman Bros. & Heintze and hold the same intact, subject to the further order of the court, and for such further relief as equity and good conscience demand."

Contemporaneously with the filing of this petition there was filed a motion for the appointment of a receiver, who should take charge of "all the property and assets of the firm of Ackerman Bros. & Heintze, upon the grounds set forth in the petition." Afterward, on

the 10th day of August, 1893, Hon. A. N. Ferguson, one of the judges of the said district court, on the presentation of the petition and motion at chambers, ordered that the hearing of the application for a receiver be had on the 17th day of August, 1893, and that, pending such application for a receiver, George A. Bennett, sheriff of Douglas county, take possession of all the partnership property of Ackerman Bros. & Heintze, situated at 1116 and 1118 Howard street, Omaha, and hold it subject to the further order of the court. Pursuant to the terms of this order the sheriff at once took possession. Later still, on the same day, the Carpenter Paper Company commenced its action in the aforesaid court against the firm of Ackerman Bros. & Heintze for the recovery of judgment of the sum of \$3,421.83. A portion of this had not matured at this time, and accordingly there was the necessary showing made for an attachment in such case, as well as with respect to the amount which was then past due, and there was thereupon at chambers made the following order:

"Upon reading the petition of the plaintiff herein and the affidavit in attachment of the plaintiff herein, and it appearing to the court that the plaintiff's claims are just, it is ordered by the court that an attachment be granted in this case against the defendant for the sum of five thousand dollars (\$5,000) upon the execution by the plaintiff of an undertaking in attachment on the part of the plaintiff to the defendant as required by law.

"August 10, 1893.

A. N. FERGUSON, *Judge*."

Immediately after the issue of the writ of attachment, and on the day of its allowance, the sheriff, then being in possession of the entire establishment of the firm of Ackerman Bros. & Heintze, as already indicated, levied said writ on a portion of its personal property. Afterward, on December 9, 1893, in due order, there was a judgment by default in favor of the Carpenter Paper Company as prayed, and in satisfaction thereof the attached property was ordered sold. On November 22,

1893, the Carpenter Paper Company filed its petition of intervention in this action, whereby it described the nature of the debt owing it by the firm of Ackerman Bros. & Heintze and detailed the proceedings had up to that time for the collection of said indebtedness. The prayer of the Carpenter Paper Company's petition of intervention was that its attachment lien might be enforced in this case and declared a lien paramount to all other liens against the property which was then in the hands of a receiver, who, on August 23, 1893, had been appointed and accordingly had succeeded to the possession of the sheriff. In this petition of intervention it was shown, and it is not questioned, that the order appointing the receiver on August 23, 1893, was expressly conditioned that the delivery of personal property by the sheriff to the receiver was without prejudice to the lien of said intervenor and that said intervenor's lien was in no way impaired by the delivery of the property taken under the aforesaid attachment proceedings. We learn from the record that the receiver was authorized to operate the plant of Ackerman Bros. & Heintze for a period of about five months; that this was done at a loss, and that in this unsuccessful attempt there was manufactured and sold the greater part of the property upon which the attachment had been levied in the suit of the Carpenter Paper Company against Ackerman Bros. & Heintze. As this property was raw material, which by the receiver, under the direction of the court, was manufactured and sold for the benefit of the estate of the insolvent firm, and as the other personal property attached had been appropriated to the payment of the debts of the firm of Ackerman Bros. & Heintze, the Carpenter Paper Company is entitled to be paid as a preferred creditor, if its attachment was valid and effective. After the Carpenter Paper Company had procured its attachment to be levied by the sheriff there were other attachment suits begun and like levies were procured to be made. There were several interventions in this action predicated on these attach-

ments, and other interventions for the purpose of having recognized and enforced the liens created by chattel mortgages executed by the firm of Ackerman Bros. & Heintze. An extended description could subserve no useful purpose, and of necessity would cause confusion. They will, therefore, be unmentioned, except where a different course is required by the exceptional relations to this action of some of the parties concerned. On the final hearing no claim for a lien was recognized, but all creditors of the firm of Ackerman Bros. & Heintze, whether parties to this action or not, were permitted to present their claims, and the property in the hands of the receiver having been sold, a *pro-rata* distribution of the proceeds was ordered to be made to the respective claimants. From this judgment two intervenors, the Carpenter Paper Company and the George R. Dickinson Paper Company, alone have appealed. The rights and status of the parties other than these two appellants will therefore remain as established by the decree of the district court, except as these shall be affected by the relief to which these appellants shall be found entitled. As the rights of these two appellants cannot be determined together, we shall first consider those of the Carpenter Paper Company.

It is urged that when the attachment suit was begun by the Carpenter Paper Company all the property of the firm of Ackerman Bros. & Heintze was *in custodia legis*, and, therefore, that no levy could be made upon it. The possession of the sheriff was merely for the preservation of the property until the statutory time necessary before the appointment of a receiver should elapse, and that, too, in an action between the partners for the dissolution of their relations as such and the distribution of the joint assets, without the least reference to the rights of the creditors. At any time plaintiffs could dismiss this action and thereby terminate the legal custody invoked against the enforcement of the claims of the creditors. Until there was actually an intervention and this

was subsequent to the levy of the Carpenter Company's attachment, this power of the partners to resume possession of their assets continued unlimited. It can readily be seen that such proceedings might be made available to hinder and delay creditors, and there are in this record some circumstances suggestive of such a purpose. In reference to the possession of the sheriff pending the application for a receiver and the rights and remedies of creditors of the firm of Ackerman Bros. & Heintze, meantime, there has been cited by counsel for the Carpenter Paper Company the following very instructive and apposite cases: *Adams v. Hackett*, 7 Cal., 187; *Adams v. Woods*, 8 Cal., 153; *Adams v. Woods*, 9 Cal., 24; *Ross v. Titsworth*, 37 N. J. Eq., 333; *Ellicott v. United States Ins. Co.*, 7 Gill [Md.], 307. Especially with reference to the difference between the relations of a mere custodian of property to it, *pendente lite*, and those of a receiver regularly appointed, the cases of *Weber v. Weber*, 63 N. W. Rep. [Wis.], 757, and *Devlin v. Mayor*, 23 N. Y. Supp., 888, are quite in point. Upon this distinction, however, we are not required to base our conclusions, for if, for the sake of the argument, it should be conceded that the custodian must be regarded as a receiver for all purposes, nevertheless the result claimed would by no means necessarily follow. In *Flenham v. Steward*, 45 Neb., 640, it was held that while it was proper to obtain permission to sue where the defendant's property was in the hands of the receiver, yet that this permission was not jurisdictional, and that by the failure of the receiver to insist upon this condition precedent it was waived and that a judgment under such circumstances was valid. To the same effect is *Mulcahey v. Strauss*, 37 N. E. Rep. [Ill.], 702, and *Tobias v. Tobias*, 38 N. E. Rep. [O.], 317. The Carpenter Paper Company is therefore, in any event, entitled to the first lien among the creditors of Ackerman Bros. & Heintze upon the assets of that firm.

The George R. Dickinson Paper Company, on August 17, 1893, filed its answer in this action alleging that on

June 29, 1893, it was a creditor of Ackerman Bros. & Heintze in the sum of \$10,238.29, evidenced by the promissory note of said firm; that on said date last named the firm of Ackerman Bros. & Heintze, for the purpose of securing said note, executed a chattel mortgage on certain property of said firm; that on August 11, 1893, said chattel mortgage was filed in the office of the county clerk of Douglas county; that immediately thereafter authority was placed in the hands of the sheriff, and ever since the said sheriff has retained said mortgaged property subject to the order of the court. In effect the prayer of the George R. Dickinson Paper Company was that the said chattel mortgage might be enforced against the property therein described as a lien paramount to that of every other creditor of Ackerman Bros. & Heintze. On the trial it was developed that at the time the said chattel mortgage was made there was executed a written agreement by the George R. Dickinson Paper Company to the effect that if certain payments were made certain renewal notes would as often be accepted for the balance due in each instance. Following this provision was this language in the said agreement: "In case said Ackerman Bros. & Heintze make said payments promptly, said extensions are to be made and the mortgage to secure said note will not be recorded, unless a failure is made in such payment or some change or difficulty shall occur in the business affairs of said Ackerman Bros. & Heintze which shall make it necessary to protect our interest, and unless we shall deem ourselves in great danger of loss." It was shown on the trial that credits were extended on the faith of appearances too favorable to Ackerman Bros. & Heintze by reason of this mortgage being withheld from record, which credits would not have been extended if the existence of the mortgage had been known. The mortgagee claims that the failure to record the chattel mortgage is available only to the parties who have made a levy on the chattels in said mortgage described. Before this mortgage was recorded the property included

therein was placed in the custody of the sheriff. In the suit wherein this property was intrusted to the sheriff the George R. Dickinson Company became a party and sought relief affirmatively as a creditor entitled to a preference by virtue of its mortgage. By assuming this attitude this mortgagee presented the question of the validity of its mortgage as entitling it to such affirmative relief. Parties adversely interested put the validity of this mortgage upon its proof by a general denial. It was not requisite that they should qualify themselves as though they were instituting proceedings to set aside this mortgage, neither was it necessary that they should plead that this mortgage was fraudulent. These issues were sufficiently presented by the tender of the Dickinson Company's mortgage by the Dickinson Company as valid with that fact properly disputed. According to the showing of this mortgagee it received this mortgage on June 29 and failed to publish its existence by filing until August 11 thereafter. It seems to be conceded by counsel for the George R. Dickinson Paper Company that, under the provisions of section 14, chapter 32, of the Compiled Statutes, it might be that this mortgage should be deemed fraudulent until it was filed, but that thereafter it should be deemed valid as though the filing had been immediately after it was made. We need not consider what the results might be if only the question of filing long after the making of the mortgage was involved, for that would be limiting our inquiry to the inference raised by statute from mere failure to act. Unfortunately for the mortgagee its motive for withholding this mortgage from record was dependent on no mere implication from non-action, for, contemporaneously with receiving this mortgage, it executed a written agreement that it would not be recorded unless some change or difficulty should occur in the business affairs of the mortgagor which would make the filing necessary to protect the interest of the mortgagee. A practical construction was given this language when the filing took place, for this was not un-

til the financial condition of the mortgagor had become so hopeless that a majority of the members had found it necessary to apply for a receiver and some of its creditors, by attachment suits, were seeking to enforce payment of their claims. The agent of the mortgagee who, in its behalf, signed the qualifying agreement which accompanied the making of the mortgage, testified that the mortgage was to be kept from record because the mortgagor's business would be injured if that course was not taken. One of the members of the firm of Ackerman Bros. & Heintze testified that the mortgage was not to be recorded until the mortgagor notified the mortgagee that the mortgagor had gotten into financial trouble such as would endanger the interests of the mortgagee. Under these circumstances the district court very properly found this mortgage fraudulent and void as to the creditors of Ackerman Bros. & Heintze, and with equal propriety permitted the mortgagee to prove its claim as a general creditor of said last named firm.

We have already quoted the prayer of the petition of Emil C. Ackerman and A. M. Heintze, among other things, for the appointment of a receiver and the preliminary order made in respect thereto. When the receiver was appointed it was, in the language of the order of appointment, "to take possession of all the partnership property and hold the same subject to the further order of the court; and until such further order said receiver is authorized and directed to run the said business of Ackerman Bros. & Heintze, to buy such stock and merchandise as is necessary to the proper conduct of the business, to hire competent help to assist him and to pay for the same, and to take charge of the books and books of account of the firm and collect the outstanding accounts." This order was made on August 23, 1893, and no other or different definition of the powers of the receiver was prescribed until the entry of the final decree, which contained the following language: "It is further ordered, adjudged, and decreed that all of the assets of the firm of Ackerman

Bros. & Heintze be sold at public sale to the highest bidder for cash on May 29, 1894." It seems that the receiver was prevented from making the sale on the day above named. He, nevertheless, without further authority, advertised the sale of the assets of the firm of which he was receiver, to take place on the 18th day of June, 1894, and accordingly on that and the following day made such sale. The George R. Dickinson Paper Company gave due notice of its objections to this sale before it was made. After the report of the receiver showing such sale further objections were duly filed by said company and overruled by the court. To this ruling the George R. Dickinson Paper Company duly excepted, and we have now presented the question as to whether or not this sale by the receiver was void. In *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb., 281, it was held that a judicial sale must be held in accordance with the decree of the court. This rule was enforced in *Hooper v. Castetter*, 45 Neb., 67. In *Mallard v. Dejan*, 14 So. Rep. [La.], 238, it was held that an order for the sale of the property of minors at private sale did not authorize a public sale, notwithstanding the fact that a few hours before the sale took place it was directed by the court that the sale should be public. In *Tompkins v. Tompkins*, 39 S. Car., 537, it was held that where the decretal order for a sale of land fixed the date thereof, a sale made at any other time was unauthorized and void. This same general principle was enforced in *Williamson v. Williamson*, 52 Miss., 725, *Macy v. Raymond*, 9 Pick. [Mass.], 284, *Marr v. Boothby*, 19 Me., 150, and *Mason v. Ham*, 36 Me., 573. The confirmation was operative, it is true, to the extent of curing defects and irregularities. (*O'Brien v. Gaslin*, 20 Neb., 347; *McKeighan v. Hopkins*, 19 Neb., 33; *Neligh v. Keene*, 16 Neb., 407; *Crowell v. Johnson*, 2 Neb., 146; *Watson v. Tromble*, 33 Neb., 450.) In *Schribar v. Platt*, 19 Neb., 625, the following language was used by COBB, J., in delivering the opinion of this court: "The only thing settled or adjudicated in the proceedings and order of confirmation, so called, was as to the proceedings

of the sheriff and those acting under and with him in the levy, appraisement, advertising, making and returning of said sale." In the sale under consideration there was no mere irregular or defective proceeding, for this sale was without authority,—a mere nullity; and a confirmation over objection presenting that question could not be made to take the place, and answer the purpose, of an order, in advance, directing the sale to be made. We are aware that this conclusion involves serious consequences from the fact that the greater part of the bid of the purchaser has already been distributed among numerous creditors of the firm of Ackerman Bros. & Heintze, but this cannot be avoided. In *Tompkins v. Tompkins*, *supra*, a sale had been made of real property as entirely without authority, as was the sale made in this case, and before appeal to the supreme court the cash which had been paid by the bidder had been distributed. This sale was held to be void, but the court, in the exercise of its equity jurisdiction, treated the bid of the purchaser as a continuing bid with the payment thereof made in advance, and directed that a decretal order should be made, on circuit, whereby the master should be directed to sell the tract in dispute after twenty-one days' public advertisement, but that the sale should, in the advertisement and in its conduct, provide that no bid would be received of less than \$3,250, the amount of the former bid, and that if no more than this was bidden, the former sale should be ratified, but that, if a greater bid should be received, it would be accepted, and from the proceeds thereof it was directed that the first purchaser was to be reimbursed the amount of his bid. This decretal order could scarcely be entered in this court with the same degree of confidence that it might if the subject-matter of the sale had been real property of which the status was not liable to have changed pending the appeal.

The judgment of the district court upon the issues joined in this case, and the order confirming the sale, are

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reversed, the sale itself is declared null and void, and this cause is remanded for further proceedings not inconsistent with the views hereinbefore expressed.

REVERSED AND REMANDED.

WILLIAM R. KING, CITY TREASURER, v. STATE OF NEBRASKA, EX REL. SCHOOL DISTRICT NO. 1, HALL COUNTY.

FILED DECEMBER 16, 1896. No. 8525.

1. **Mandamus: ALTERNATIVE WRIT.** The facts recited in an alternative writ of *mandamus*, unaided by extrinsic matter, must be sufficient to entitle to the issue of a peremptory writ.
2. ———: ———: **DEMURRER.** On a demurrer to the recitations in the alternative writ, all such recitations must be considered; and the refusal of compliance upon certain grounds by the respondent will be *held* to excuse technical exactness in stating why, on other grounds, the relator is entitled to the relief sought.
3. **Schools: FINES AND LICENSE FEES: DISTRIBUTION.** Where fines, penalties, or license moneys are in the hands of the treasurer of a city of the first class having over 8,000 and less than 25,000 inhabitants, such moneys are properly distributable among the common schools which territorially constitute a part of the city.

ERROR from the district court of Hall county. Tried below before THOMPSON, J. *Affirmed.*

George H. Thummel, for plaintiff in error.

Charles G. Ryan, *contra.*

RYAN, C.

An application for a *mandamus* was made in the district court of Hall county on the relation of school district No. 1 to compel the defendant to pay certain money. The alternative writ recited the facts in this language: "It has been suggested to this court by the affidavit of Henry

Giese, treasurer of school district No. 1, Hall county, relator herein, that you have during the period between the 9th day of April, A. D. 1895, and the 10th day of July, A. D. 1895, both days inclusive, received, collected, and had paid over to you, as city treasurer of the city of Grand Island, Nebraska, the sum of \$8,638.20 as fines, penalties, and licenses paid in said city, which city is a city of the first class governed by the provisions relative to cities over 8,000 and less than 25,000, and that the schools of said city are under the direction and control of a board of education consisting of nine members, as by the statute provided, and * * * it appears that, under the statutes of the state of Nebraska for such cases made and provided, the sum of \$258.91 is due to the said school district No. 1, Hall county, Nebraska, of said moneys so collected and received, as its *pro rata* share according to the school census taken for the year 1894 in said school district No. 1, and in said school district of Grand Island, school districts Nos. 30, 38, and 74, which districts form in part or whole the corporate limits of said city of Grand Island, and it further appearing to the court that the relator made due and legal demand upon you for the said sum of \$258.91, its *pro rata* share of the said moneys so collected and received by you as above set forth, and that you refused, and still do refuse, to pay to the said relator, or its treasurer, the said sum of \$258.91, or any part thereof, but hold the same claiming that said money belongs in whole to the school district of the city of Grand Island, in the county of Hall, in the state of Nebraska, and that you did then and still do refuse to pay to said relator, or its treasurer, the said sum, or any part thereof, as by law in such cases made and provided, and that the relator is unable to procure from you the said money, or any part thereof, according to the duly filed petition of said relator heretofore filed in this court." The above recitations were followed by an alternative order requiring performance within the time therein specified, or that cause be shown for not

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complying with such mandate. To the facts above recited as being contained in the alternative writ the defendant filed a general demurrer, which was overruled, to which ruling he excepted, and, electing to stand on his demurrer, a peremptory writ was ordered to issue.

Section 653 of the Code of Civil Procedure provides that no other pleading or written allegation is allowed than the writ and answer, and we must therefore determine the sufficiency of the facts upon the recitations of the writ unaided by anything which preceded it. Whether these were sufficient to entitle to the relief prayed is not wholly free from doubt. It is recited that "it appears that, under the statutes for the state of Nebraska for such cases made and provided, the sum of \$258.91 is due to school district No. 1 of Hall county, Nebraska, of said moneys so collected, as its *pro rata* share according to the school census taken for the year 1894 in said school district No. 1, and in the said school district of the city of Grand Island, school districts Nos. 30, 38, and 74, which said districts form in part or whole the corporate limits of the city of Grand Island." This we admit was faulty, in that it did not state in detail the facts from which it appears how the sum of \$258.91 became due to school district No. 1. The language last above quoted from the alternative writ bordered very closely upon mere conclusions as distinguished from statements of fact. The defendant, however, demurred to these statements, and a demurrer should not be made to perform the functions of a motion for a more specific statement. It admitted to be true all the facts stated in the alternative writ, one of which was that respondent, as treasurer of the city of Grand Island, had collected a certain sum as fines, penalties, and licenses, of which, under the statutes of this state and its *pro rata* share according to the school census taken for the proper year, it was the duty of the respondent to pay to the district No. 1 the sum of \$258.91; that on demand the respondent had refused to pay any part of the

sum due said district, claiming that said money belonged wholly to the school district of the city of Grand Island. It appears to us that as defendant based his refusal to pay this sum on the ground that the school district of the city of Grand Island was alone entitled to it, the same technical exactness in describing the right of district No. 1 to this particular amount ought not to be required, as the defendant might insist upon if there was a question made as to what the school census disclosed. The respondent was not required to pay to school district No. 1 without satisfactory evidence. This it was entitled to receive, but as he saw fit to base his refusal solely on another ground, the sufficiency of that ground to justify the refusal is all that at this stage of the proceedings he should be permitted to question. We therefore conclude that in so far as the technicality of statements in the writ is thereby involved, there is no reversible error in overruling the demurrer.

This brings us to the next contention of the plaintiff in error, and that is that the views expressed by this court in *State v. Fenton*, 29 Neb., 348, are applicable to the case under consideration. The first criticism under this head is that the defendant acted as city treasurer and as treasurer of the school district, wherefore it is urged that it does not appear that he should be required to make the payment demanded. The recitation in the writ is that the collection was made as treasurer of the city of Grand Island. This recitation, for the purposes of the demurrer, is conclusive of the capacity in which the respondent was acting when he received the money which it is now sought to compel him to pay. Again, it is urged that *State v. Brodboll*, 28 Neb., 254, and *State v. Fenton*, *supra*, were decided under the statute applicable to school districts which levied taxes and collected their revenue in the same manner as did any other school district in their respective counties. We have been informed of no reason why the mere fact that the village in which was situated either of these school districts did not, as such, levy

taxes for the support of schools should control the following unequivocal language of section 5, article 8, of the constitution: "All fines, penalties, and license moneys arising under the general laws of the state shall belong to and be paid over to the counties, respectively, where the same may be levied or imposed; and all fines, penalties, and license moneys arising under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivisions less than a county shall belong to and be paid over to the same, respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue." In this case it is merely sought to compel the treasurer of Grand Island, one of the above referred to subdivisions of the state, to pay a school district composing a part of this subdivision the *pro rata* share of the money to be used for school purposes to which it is entitled. To this demand it is no answer to say that Grand Island is governed by a board consisting of nine members, and raises school revenues by virtue of a power of taxation vested in this subdivision and denied to country school districts. Another matter discussed by the defendant is the holding of the two cases last cited, that the division of school moneys arising from fines, etc., should be made equally between the school districts of which the village in which they are situated is composed. Under the statutes as they then stood there was no ratio of apportionment prescribed. Since that time there has been enacted chapter 63, Laws of 1895, of which act the first section is as follows: "That in cities and villages whose corporate limits form, in whole or in part, more than one school district, all money derived from fines, penalties, and licenses shall be apportioned to these several districts in proportion to the number of persons of school age residing in each district included, in whole or in part, in said corporate limits, according to the school census taken last before any such apportionment." This

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change in the statute necessitated the method of apportionment indicated by the language of the alternative writ, and with this modification the language of the opinions referred to is applicable to the case under consideration. The judgment of the district court is

AFFIRMED.

**MARY SHAFER, APPELLANT, V. EUGENE O. HOSTETLER
ET AL., APPELLEES.**

FILED DECEMBER 16, 1896. No. 6942.

Review: CONFLICTING EVIDENCE: AFFIRMANCE. There is presented by this appeal a mere question of fact determined by the district court upon fairly conflicting evidence.

APPEAL from the district court of Kearney county.
Heard below before **BEALL, J.** *Affirmed.*

Ed L. Adams, for appellant.

Greene & Hostetler, contra.

RYAN, C.

Mary Shafer brought this action in the district court of Kearney county against the appellees herein to procure a decree canceling a deed executed by herself, with her husband, to the firm of Green & Shipman, and to have set aside a deed made by said firm to E. O. Hostetler. From the judgment, which denied the relief prayed, she has appealed to this court.

It is urged that there are presented two questions, of which the first is whether or not the lot conveyed was at the time of such conveyance a homestead; and second, whether or not appellant was then of sound mind. It is not questioned that she signed the deed and acknowledged it, if she was mentally capable of such acts, so

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that in reality it is immaterial whether the lot at the time was a homestead or not. There is, therefore, in this case but one question, and that is whether or not, when appellant joined her husband in executing and acknowledging the deed, she was of sound mind. This question was one of fact, settled adversely to her by the district court upon fairly conflicting evidence. The judgment is therefore

AFFIRMED.

**CHARLES W. EDGERTON V. STATE OF NEBRASKA, EX REL.
V. O. STRICKLER.**

FILED DECEMBER 16, 1896. No. 6955.

Review: SUBSTANTIVE RIGHT: DISMISSAL. Where the judgment of the district court required a justice of the peace to exercise his functions within a designated precinct, and by error proceedings it is sought to review only this part of the said judgment, and it is conceded that the term of office of the plaintiff in error has expired, the petition in error is dismissed as presenting no question of an existing substantive right of the plaintiff in error.

ERROR from the district court of Douglas county.
Tried below before AMBROSE, J. *Dismissed.*

George G. Bowman and B. S. Baker, for plaintiff in error.

V. O. Strickler, contra.

RYAN, C.

In this proceeding plaintiff in error seeks to have reviewed that portion of the judgment of the district court of Douglas county against him, which judgment was in the following language: "It is therefore considered by the court that a peremptory writ of *mandamus* issue against said defendant, Charles W. Edgerton, commanding him to cease from exercising any of the functions

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of justice of the peace in the city of Omaha, and that he hereafter perform all the functions and duties of a justice of the peace outside the city of Omaha, and in and for the precinct of West Omaha, in and for which he was elected as a justice of the peace." In his brief, plaintiff in error says that his term of office has expired, and that "An honored successor sits unchallenged in his place." The judgment for costs is not assigned as erroneous in his petition in error, and there remains solely the questions as to how and where the plaintiff in error should perform the duties of an office which, so far as he is now concerned, has ceased to exist. As there is presented upon the record no existing substantive matter of right of plaintiff in error for our consideration, his petition in error is

DISMISSED.

**MATILDA BRASCH, APPELLEE, V. HERMAN BRASCH,
APPELLANT.**

FILED DECEMBER 16, 1896. No. 6945.

1. **Pending Actions.** Within the meaning of section 12, chapter 25, Compiled Statutes, an action is pending from its commencement until its final determination on appeal or error, or until the time fixed by statute for prosecuting an appeal or an error proceeding has expired.
2. **Divorce: ALIMONY PENDENTE LITE: DISCRETION OF COURT.** What sum a husband may be required to pay to his wife for her support during the pendency of a divorce suit for her "expenses" in prosecuting or defending the action, for counsel fees, and whether such sums shall be paid before the final hearing of the action and as a condition precedent to the right of the husband to further prosecute or defend, are matters within the discretion of the district court.
3. ———: ———: ———. It is equally within the discretion of the court to postpone until the final hearing of the case allowances made and then render a decree against the husband therefor.
4. ———: ———: ———. Allowances made in a divorce suit by a dis-

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strict court for the temporary support of the wife for "expenses" and attorney's fees will not be disturbed unless it appears that the court abused its discretion.

APPEAL from the district court of Madison county.
Heard below before JACKSON, J. *Affirmed.*

Robertson, Wigton & Whitham, for appellant.

Powers & Hays, contra.

RAGAN, C.

In the district court of Madison county, Matilda Brasch sued her husband, Herman Brasch, for a divorce. As a basis for her action she averred that her husband had been guilty of extreme cruelty toward her and was physically incompetent at the time of their marriage. The district court by its decree dismissed the action of Mrs. Brasch and taxed the costs of the action to her husband, and at the same time awarded her a decree against him for the sum of \$100 for "costs and expenses incurred in the prosecution of the suit." From this part of the decree Herman Brasch appeals.

The argument is made that the court having dismissed the wife's action, was without authority to render a judgment against the husband for the "costs and expenses" incurred by the wife in the prosecution of the suit. Section 12, chapter 25, Compiled Statutes, is as follows: "In every suit brought either for a divorce or for a separation the court may in its discretion require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency, and it may decree costs against either party, and award execution for the same," etc. The theory of appellant's counsel seems to be that this judgment of the district court awarding the wife "costs and expenses" incurred in the prosecution of the suit could have been made only by the court before the final decree was pronounced; or, in other words, that the decree appealed from was not

rendered during the "pendency" of the action within the meaning of the statute quoted above. We do not think this contention is tenable.

In *Wegman v. Childs*, 41 N. Y., 159, it was held that an action was pending, though judgment had been recovered therein, so long as such judgment remained unsatisfied. While no provision of our Code declares for what length of time an action shall be deemed pending, we think that it pends at least from its commencement until its final determination on appeal or error, or until the time fixed by statute for prosecuting an appeal or an error proceeding has expired; and that the order appealed from here was made during the pendency of the action in which it was made; within the meaning of the statute quoted above. (*Link v. Connell*, 48 Neb., 574.) Doubtless a district court, in a divorce suit, before the trial thereof, is invested with authority, upon application and a showing being made therefor, to order the husband to pay to the wife sufficient money to support her during the pendency of the litigation; to pay her reasonable counsel fees and other expenses necessary to enable her to prosecute or defend the action; and the court may compel the husband, as a condition precedent to further prosecute or defend his suit, to comply with the order made. But it by no means follows that if such an order for suit money or temporary alimony is not made by the court before the trial of the case that the court is divested of jurisdiction or authority to award the wife suit money or temporary alimony in the decree rendered. Or, to paraphrase the language of Bishop, the district court may make up by its decree at the close of the suit what was lacking in justice during its progress.

The Code of Civil Procedure of the state of New York provided that such allowances may be made from time to time during the pendency of an action for divorce as are necessary to enable the wife to carry on or defend the action. Construing this the court of appeals of that state, in *McBride v. McBride*, 23 N. E. Rep. [N. Y.], 1065,

held that where a judgment of divorce had been awarded the wife and the husband had appealed, that the court had authority to make an order directing the husband to pay such sums as might be necessary to enable the wife to defend the appeal.

Section 137 of the Code of Civil Procedure of the state of California provides that when an action for divorce is pending the court may in its discretion require the husband to pay, as alimony, any money necessary to enable the wife to support herself or her children or to prosecute or defend the action. *Bohnert v. Bohnert*, 27 Pac. Rep. [Cal.], 732, was an action for divorce in which a decree was rendered against the wife. The supreme court of California held that the district court in which the decree was pronounced was invested with authority to make an order compelling the husband to pay into the court a sum of money sufficient to enable the wife to employ counsel and pay the expenses for prosecuting an appeal.

O'Brien v. O'Brien, 19 Neb., 584, was an action brought by a wife to modify or set aside a decree of divorce, already granted in a suit between herself and husband, on the grounds that such decree had been obtained by fraud, and this court held that the district court in which the action was brought had authority to require the husband to pay into court a reasonable sum to enable her to prosecute the action.

Griffin v. Griffin, 47 N. Y., 134, is an instructive case as to the authority of a court of equity upon the final hearing of a divorce case to award, in addition to a decree disposing of the action, a further decree against the husband for expenses incurred by the wife for counsel fees and otherwise in litigating the action in her behalf. In that case the husband brought suit against the wife to annul their marriage contract upon the grounds that at the time of making the same she had a former husband living. It appears that prior to the rendition of the decree no order of the court was made awarding the wife

temporary alimony or suit money, but when the court rendered its final decree disposing of the action, and as a part thereof, it awarded her counsel fees of \$1,200 and \$929.50 for other expenses incurred by her in defending the action and decreed that the husband pay said sums to the wife. From this part of the decree the husband appealed. A statute of New York, in force at that time, provided that suits to annul a marriage should be by bill in chancery and should be conducted in the same manner as other suits prosecuted in courts of equity; and that the court should have the same power to award issues, to decree costs, and to enforce its decrees as in other cases. Another statute provided that in every suit brought for a divorce or separation the husband might be required to pay any sum necessary to enable the wife to carry on the suit during its pendency. The court of appeals, construing the first of the statutes quoted above, held that it contained no express authority authorizing the court in an action for divorce to award counsel fees or expenses on a final decree unless such authority was embraced in the term "costs;" and in construing the second statute quoted held that its provisions were only applicable to cases in which the wife had brought the suit; but the court said: "Yet it has been the constant practice of the courts of chancery, both before and since the revised statutes, to make equitable provision for all these matters; and in so doing, it has been guided by the decisions of the ecclesiastical courts of England in similar cases. * * * This has not been done upon the theory that the court of chancery of this state was vested with the jurisdiction of the ecclesiastical courts of England in matrimonial cases, or that * * * it ever possessed any jurisdiction in cases of divorce other than that which was conferred by our own statutes, but upon the ground of the general equitable jurisdiction of the court, and also that when our statutes did confer jurisdiction upon the court of chancery, in those actions for divorce which by the English law are solely cognizable in the ecclesi-

astical courts, the grant of that jurisdiction carried with it by implication the incidental powers which were indispensable to its proper exercise and not in conflict with our own statutory regulations on the same subject." And the court concluded that although no statute existed in New York authorizing in express terms the decree rendered by the *nisi prius* court, yet that court, as a part of its general equity jurisdiction, had authority to award the wife in the decree a sum of money sufficient to cover her expenses in defending her action and for paying her counsel.

But it is to be observed that section 12 of our statute quoted above differs from the New York statute just quoted in this respect: The language of the New York statute is that the husband may be required to pay any sum necessary to enable the wife to carry on the suit, while our statute provides that the husband may be ordered to pay any sum necessary to enable the wife to carry on or defend the suit. So that if express statute is necessary to invest the district court with authority to make a husband liable for the "expenses incurred" by a wife in prosecuting or defending an action for divorce it is found in section 12, chapter 25, quoted above. What sum a husband may be required to pay to his wife for her support during the pendency of a divorce suit, for her reasonable and necessary expenses in prosecuting or defending the action, for counsel fees, and when such sums shall be paid,—*i. e.*, whether before the final hearing of the action and as a condition precedent to the right of the husband to further prosecute or defend,—are matters entirely within the discretion of the district court; and it is equally within the discretion of that court to postpone until the final hearing of the case the allowance, if any, made the wife for expenses and counsel fees in prosecuting or defending the action, and to render a judgment or decree against the husband at the time of disposing of the suit for such sum as appears to be reasonable and necessary; and the allowance made by the district court

for the temporary support of the wife or for expenses and attorney's fees will not be disturbed unless it appears that the court has abused its discretion. (*Bohnert v. Bohnert*, 27 Pac. Rep. [Cal.], 732; *Graves v. Graves*, 33 N. E. Rep. [O.], 720; *Haines v. Haines*, 35 Mich., 138; *Burgess v. Burgess*, 25 Ill. App. Ct., 525.)

DECREE AFFIRMED.

C. E. BATES V. PHOENIX PUBLISHING COMPANY.

FILED DECEMBER 16, 1896. No. 6918.

1. **Justice of the Peace: APPEAL: AMOUNT OF CLAIM.** Whether the judgment of a justice of the peace is appealable is made by section 985 of the Code of Civil Procedure to depend upon the amount claimed by either the plaintiff or defendant in the bill of particulars filed by him before such justice, and not upon the amount for which either party may recover a judgment.
2. ———: ———: **TRANSCRIPT.** For the purpose of determining whether it has jurisdiction to entertain such an appeal, the district court must look, and look only, to the transcript certified to it from the justice of the peace.

ERROR from the district court of Douglas county.
Tried below before SCOTT, J. *Reversed.*

B. F. Thomas, for plaintiff in error.

I. J. Dunn, *contra*.

RAGAN, C.

The Phoenix Publishing Company recovered a judgment against C. E. Bates before a justice of the peace of Douglas county. Bates perfected an appeal to the district court. Thereupon the publishing company moved to dismiss the appeal, on the grounds "that this action is one that is not subject to appeal under the statutes, for the reason that the same is a civil action

for money and was tried in a justice court before a jury, and the amount claimed was less than twenty dollars." The district court sustained this motion and entered an order dismissing the appeal, to review which Bates prosecutes here a petition in error.

Section 985 of the Code of Civil Procedure provides: "If either the plaintiff or defendant, in his bill of particulars, claims more than twenty dollars, the case may be appealed to the district court; but if neither party demands a greater sum than twenty dollars, and the case is tried by jury, there shall be no appeal." The transcript of the proceedings had before the justice of the peace recites that the publishing company filed its bill of particulars asking judgment against Bates for \$18.75 "upon a certain written contract;" that Bates filed a counter-claim asking judgment against the publishing company for \$25, for damages sustained by him by reason of false statements contained in the said "sun and pen light sketches." No pleadings were filed by either party in the district court. Whether the judgment of the justice of the peace was appealable is made, by the section of the Code quoted, to depend upon the amount claimed by either the plaintiff or the defendant in the bill of particulars filed by him before the justice, and the jurisdiction of the district court is shown by the transcript of the justice; and such transcript of the proceedings had before the justice of the peace, certified to the district court, was the only thing to which the district court could look to determine its jurisdiction. That transcript recited that the defendant, before the justice of the peace, filed a counter-claim, claiming judgment against the plaintiff below for \$25, and the claim made the judgment rendered appealable and invested the district court with jurisdiction. (*Kingsbury v. Franz*, 40 Neb., 400; *Moise v. Powell*, 40 Neb., 671.)

It is said here by counsel for Bates that the counter-claim interposed by him was for an alleged tort committed by the publishing company, and it seems to be his

theory that the district court was justified in entirely disregarding this counter-claim and in considering the case as if none had been filed. But suppose the subject of the counter-claim was the tort of the publishing company, still, if it constituted a cause of action in favor of Bates and against the publishing company, and arose out of the contract or transaction made the subject of the publishing company's bill of particulars, or if it was connected with the contract upon which the publishing company sued, it was then a counter-claim that might have been legally urged as a defense to the action of the publishing company. (Code of Civil Procedure, sec. 101.) We do not know whether the counter-claim filed by Bates stated a cause of action in his favor against the publishing company, and one that he might urge as a defense to the publishing company's action, as no copy of that pleading is in the record. If the publishing company had replied in the district court, and Bates had then filed his counter-claim therein, the district court would have been in a position to determine whether the alleged counter-claim was a valid one, and one that might be urged as a defense to the publishing company's action; and had it then appeared to the court that the counter-claim urged by Bates was not a cause of action existing in his favor and against the publishing company, or, if a cause of action, that it did not arise out of the contract or transactions made the basis of the publishing company's action, or was not connected with that cause of action, then the district court might have struck that counter-claim or answer out; but even then the district court would not have been justified in dismissing the appeal on the grounds that the judgment of the justice of the peace was not appealable, and that it, the district court, was without jurisdiction, as the defendant in the justice court, having filed a bill of particulars and claimed a judgment against the plaintiff below for more than \$25, by that act made the judgment rendered below an appealable one, invested the district court with juris-

diction to hear the appeal, and was entitled to have the district court say, on appeal, as a matter of law, whether his counter-claim filed below was a valid one, and the power to so determine was jurisdictional.

It must be borne constantly in mind that section 985 of the Code makes the right to appeal from a judgment of a justice of the peace to depend upon the amount claimed by either a plaintiff or defendant in his bill of particulars, and not upon the amount which either the plaintiff or the defendant may recover a judgment for before the justice; and the appellate jurisdiction of the district court depends upon the question as to whether the judgment of the justice of the peace was appealable, and to determine that question, in the absence of new pleadings before it, the district court must look, and look only, to the transcript certified to it from the justice of the peace. This section of the Code is analogous to the acts of congress which made the right to remove an action brought in a state court to a federal court depend upon the amount in controversy. The judiciary act of 1789 provided, among other things, that if a suit should be commenced in a state court by a citizen of the state against a citizen of another state, and that the matter in dispute exceeded the sum or value of \$500, exclusive of costs, that the defendant, upon complying with certain other provisions of the act, might remove the case to the federal court. A citizen of Kentucky brought a suit to the court of that state against a citizen of another state, and claimed, in his declaration, damages in the sum of \$1,000. The state court denied the application of the defendant for an order removing it to the federal court, and the suit proceeded to judgment in the state court, where the plaintiff recovered \$420. This judgment having been affirmed by the supreme court of Kentucky, the defendant carried the case to the supreme court of the United States, and that court, construing the judiciary act, held that the amount of damages claimed by the plaintiff in his declaration was the sum or value of the matter in

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dispute; that it was the claim made by the plaintiff in his declaration which invested the defendant with a right to remove the case to the federal court, and that this claim of the plaintiff in his declaration was the only thing to which the federal court should look to determine its jurisdiction; that is, to determine whether the case was removable. (*Gordon v. Longest*, 16 Pet. [U. S.], 97.)

We think, in the case at bar, that the judgment rendered by the justice of the peace was appealable; that when the appeal was perfected the district court had jurisdiction of the action, and that it erred in dismissing the appeal, and its judgment is reversed.

REVERSED AND REMANDED.

GEORGE W. EGGLESTON, APPELLEE, v. JOHN D. SLUSHER
ET AL., IMPEADED WITH HANNAH BURCHAM, APPELLANT.

FILED DECEMBER 16, 1896. No. 6927.

1. **Husband and Wife: OWNERSHIP OF PROPERTY.** Under the common law, in force in this state prior to the taking effect of the Married Woman's Act, June 1, 1871, the wife's chattels became those of the husband and her choses in action became his when reduced to possession.
2. ———: PROCEEDS OF INSURANCE POLICY: RIGHTS OF CREDITORS. Prior to 1871, a wife received moneys from the estates of her relatives, which she immediately delivered to her husband, who invested them in property in his own name. Certain of this property was insured against fire. It was destroyed by fire and he executed an assignment of the policy to his wife, ostensibly for the purpose of repaying her moneys so by him received. It was not shown that when the husband received the money there was any agreement between him and his wife for its repayment, or that it should be treated as a loan. In a contest between the wife and the husband's creditors, *held*, that the money became his under the law as it existed when it was received; that the subsequent assignment of the policy of insurance to the wife was without considera-

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tion, and that the equities of creditors who had also procured assignments of the policy, or liens by garnishment proceedings upon its proceeds, were superior to those of the wife.

APPEAL from the district court of Lancaster county.
Heard below before STRODE, J. *Affirmed.*

Stevens & Cochran, for appellant.

R. D. Stearns, F. A. Bochmer, and Ricketts & Wilson,
contra.

IRVINE, C.

This was an action by Eggleston against John D. Slusher and others, the object of which was to have the proceeds of a certain policy of fire insurance, issued in favor of Henry Burcham, applied to the satisfaction of a judgment recovered by Eggleston against Burcham. There were several claimants of the fund, and the case can perhaps be best elucidated by stating, without reciting the numerous pleadings, the claims of the interested parties, together with a preliminary statement of certain facts not in dispute.

Henry Burcham was, in 1891, the apparent or actual owner of a grain elevator, together with certain machinery, grain therein, and other property connected therewith, on which he held a policy of insurance for \$3,000. This property was destroyed by fire. After the loss Burcham's rights under the policy were assigned to the defendant Slusher to secure certain indebtedness from Burcham to Slusher. Slusher prosecuted an action against the insurance company, recovering a judgment, which was paid by the insurance company. After deducting attorneys' fees, together with another claim upon the fund, the validity of which is not disputed in the evidence, there remained in the hands of Slusher \$1,950.35, upon which Slusher claims only a lien for \$365; the remainder he is willing to pay to the party adjudged entitled thereto. Hannah Burcham, the wife of Henry

Burcham, claims this fund, because she received from sources other than by gift from her husband certain moneys, which she immediately paid to her husband, under an agreement, as she claims, that he would repay the same, with six per cent interest. After the loss by fire he assigned to her the policy of insurance for the purpose of securing and paying to her said debt. This assignment, if valid, antedated all other claims upon the fund, so far as they are evidenced by assignments of or garnishments upon the fund. The plaintiff, Eggleston, claims the fund by reason of an assignment thereof made to him after the loss, and subsequent to the assignment to Slusher. The principal contention, and, in fact, the only one argued in the briefs, is between Mrs. Burcham and Eggleston. Other parties claim liens upon the fund by virtue of garnishments issued after judgments rendered against Henry Burcham. The district court entered a decree finding generally in favor of the plaintiff, and then finding specially, among other things, that Henry Burcham and Hannah Burcham were married in 1867, "and that by the year 1871 she had received from her father's estate about \$2,600, which was, immediately upon its receipt, turned over to her husband, Henry Burcham; that all of said money has been used by said Henry Burcham, either in his business, conducted entirely in his own name ever since that date, or used in purchasing land, and that the title to said land has been taken in every instance in his own name, and remained in his name until disposed of by him; that no part of said \$2,600 so turned over to said Henry Burcham has ever been repaid to her, except \$1,000 paid by Jacob Roche in the spring of 1893." The court further found specially that by reason of Mrs. Burcham's permitting her husband to invest the money in his own name, and to hold out the property thereby acquired by him as his own for more than fifteen years, she had estopped herself from claiming it as against her husband's creditors. Accordingly it was decreed that out of the fund in contro-

versy, after paying the costs, the sum of \$365 should be paid to Slusher, and that the plaintiff and other creditors should then be paid in accordance with their claims as against that of Mrs. Burcham. From this decree Mrs. Burcham appeals.

The argument takes a wide range, covering, in a more or less specific manner, many of the problems which confront the court whenever a married woman becomes involved in litigation with creditors of her husband. In order to determine the case it is not necessary to consider many of these arguments. It will be observed that Mrs. Burcham's claim rests on the ground that with money which she obtained by inheritance she made her husband a loan, that he used this money in business, and that the assignment of the policy was an act on his part intended to secure her a preference, and to repay the loan. It may be conceded, as many of our cases indicate, that the effect of our Married Woman's Act is to validate such transactions between husband and wife; that when they occur they are to be measured according to the rules of law which govern similar transactions between strangers; that while it is true that the relationship existing between the parties shifts the burden of proof as to *bona fides*, and may raise other questions involving complications, still, when such exceptional facts arising out of the married relation are eliminated, the fundamental rules of law are the same, and a husband has the same right to prefer his wife as any other creditor, good faith being the main consideration for the courts. In order, however, for a wife to claim the advantage of such a conveyance, it is not sufficient for her to show that she has supplied her husband with money or property. The relationship of debtor and creditor must be established. The special findings in this case do not establish such a relationship. The finding merely is that "by the year 1871 she had received from her father's estate about \$2,600, which was, immediately upon its receipt, turned over to her husband." The finding thus far is amply sus-

tained by the evidence; but it does not involve a finding that the "turning over" was by virtue of any contemporaneous agreement that it should be treated as a loan and repaid, with or without interest. There is a general finding for the plaintiff, and the evidence is not sufficient to conclusively show there was any such agreement. On the contrary, the almost irresistible inference is that the money was paid to the husband without any agreement, express or implied, and that there was no understanding in regard to its repayment until long afterwards, when the husband became involved in financial difficulties. It has been several times held that while such transactions between husband and wife, when conducted in good faith, will be sustained as against the creditors of the husband, there must, in order to support them, be shown that the transaction was a loan, and that there was an agreement to repay the money. (*Wake v. Griffin*, 9 Neb., 47; *Hoagland v. Wilson*, 15 Neb., 320.) Furthermore, the finding, supported by the evidence, is that "by the year 1871" Mrs. Burcham had received the money, and immediately on its receipt turned it over to her husband. Our Married Woman's Act took effect June 1, 1871. (Session Laws, 1871, p. 68.) Prior to the taking effect of that act the common law was in force, whereby the unity of husband and wife was recognized. Her chattels became his, and her choses in action became his when reduced to possession. This finding, then, must be taken to establish the fact that before the Married Woman's Act took effect the husband had obtained possession of these funds, and they were therefore his in law before the rights of married women were acquired by the act referred to. Without considering, therefore, the question of estoppel by reason of her permitting her husband to invest her money in his own name, and the contention that the other claimants to the fund had extended credit on the faith of his apparent ownership, we conclude that it was not shown that under the law existing at the time of the advancement, or by the facts surrounding the advancement, of the

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money it was then intended or operated as a loan by the wife to him. The assignment of the policy was, consequently, voluntary and without consideration. It follows that she had no equity by virtue of the assignment superior to the rights of those acquiring liens upon the fund by virtue of debts owing from her husband. The decree of the district court is right and is

AFFIRMED.

STATE OF NEBRASKA, EX REL. NORFOLK BEET-SUGAR COMPANY, V. EUGENE MOORE, AUDITOR OF PUBLIC ACCOUNTS.

FILED DECEMBER 16, 1896. No. 8818.

1. **Bounties: APPROPRIATIONS.** Session Laws, 1895, chapter 1, providing bounties for sugar manufactured in the state, carries no appropriation for the payment of such bounties; and, there being no appropriation for that purpose elsewhere, the auditor has at present no authority to issue warrants in payment of such bounties.
2. **Legislative Appropriations: CONSTITUTIONAL LAW.** Our constitution requires a specific appropriation made by law to authorize the expenditure of public funds. In the absence of such an appropriation the executive officers have no power to make such expenditures no matter how great may be the state's moral or legal obligation to pay.
3. —: —. An appropriation, within the meaning of our constitution, is the setting apart by law of a certain sum from the public revenue for a specified purpose, so that the executive officers are authorized to expend that sum, and no more, for that purpose, and no other.
4. —: —. An appropriation is not specific if it leaves the amount to be expended to be limited only by the extent of claims which may regularly be made upon it by the recipients, the amount of those claims being uncertain.
5. —: —: **TIME.** Appropriations can only extend to the end of the next fiscal quarter succeeding the adjournment of the next regular session of the legislature. Therefore an act by its express terms enduring for a longer period cannot be construed as carry-

ing an appropriation without making it void as in conflict with the constitution.

6. **Statutes: CONSTRUCTION.** When certain language is used in a statute, and language of similar import has previously been used in other acts, and has received a practical interpretation by the legislative and executive departments of the government, while such practical construction will not control the courts in construing the later act, it will generally be presumed that the language of the later act was adopted with a view to such practical construction given the earlier act.

ORIGINAL application for *mandamus* to compel the auditor of public accounts to issue a warrant in payment of relator's claim for bounty on beet-sugar, under chapter 1, Session Laws of 1895. *Writ denied.*

The facts are stated in the commissioner's opinion.

Charles F. Manderson and *W. S. Summers*, for relator:

Where a producer of sugar accepts the offer of a bounty from the state and complies with the statute, it would seem to be as much of a contract as it is possible for any citizen to make with the government. All the elements of a contract are present,—the terms, the consideration, and the lawful object. (*Calder v. Henderson*, 54 Fed. Rep., 802.)

A state cannot impair the obligation of contracts. (*State of New Jersey v. Wilson*, 7 Cranch [U. S.], 164; *Woodruff v. Trapnall*, 10 How [U. S.], 190; *Charles River Bridge v. Warren Bridge*, 11 Pet. [U. S.], 549.)

The statute makes an appropriation. The use of technical words in a statute is not necessary in order to make an appropriation. It is sufficient if the legislative intention appears. (*Campbell v. Board of Commissioners of State Soldiers' and Sailors' Monument*, 115 Ind., 591; *In re Appropriations*, 32 Pac. Rep. [Colo.], 272; *Proll v. Dunn*, 80 Cal., 220; *Carr v. State*, 22 Am. St. Rep. [Ind.], 624; *Reynolds v. Taylor*, 43 Ala., 420; *Nichols v. Comptroller*, 4 Stew. & P. [Ala.], 154; *Thomas v. Owens*, 4 Md., 189; *Green v. Purnell*, 12 Md., 329; *State v. Hickman*, 10 Mont., 497;

State v. Weston, 4 Neb., 216; *People v. Brooks*, 16 Cal., 11; *Goodykoontz v. Acker*, 19 Colo., 360; *Ristine v. State*, 20 Ind., 329; *State v. Hoffman*, 35 O. St., 435; *State v. Burdick*, 33 Pac. Rep. [Wyo.], 125; *Reynolds v. Taylor*, 43 Ala., 420; *People v. Miner*, 46 Ill., 384; *Humbert v. Dunn*, 84 Cal., 57; *State v. Moore*, 40 Neb., 854; *Hartman v. Greenhow*, 102 U. S., 672; *Poindexter v. Greenhow*, 114 U. S., 270; *State v. Cardozo*, 28 Am. Rep. [S. Car.], 275.)

A. S. Churchill, Attorney General, and George A. Day, Deputy Attorney General, contra:

The act does not appropriate, within the meaning of the constitution, any money for payment of a bounty. (*State v. Babcock*, 22 Neb., 33; *State v. Moore*, 36 Neb., 579; *State v. Medberry*, 7 O. St., 522; *State v. Weston*, 6 Neb., 17; *State v. Liedtke*, 9 Neb., 468; *State v. Wallichs*, 12 Neb., 407; *State v. Kennon*, 7 O. St., 546; *State v. Babcock*, 18 Neb., 222; *State v. Stover*, 47 Kan., 119.)

IRVINE, C.

This is an original application for a writ of *mandamus* to compel the respondent, the auditor of public accounts, to draw a warrant in favor of the relator. The right to the warrant is claimed by virtue of "An act to provide for the encouragement of the manufacture of sugar and chicory, and to provide a compensation therefor." (Session Laws, 1895, ch. 1.) By the first section of this act it is provided "that there shall be paid out of the state treasury to any person, firm, or corporation engaged in the manufacture of sugar in this state from beets, sorghum, or other sugar-yielding canes or plants grown in Nebraska, the sum of five-eighths of one cent per pound upon each and every pound of sugar so manufactured under the conditions and restrictions of this act." This is followed by a further provision whereby persons establishing after the passage of the act additional factories shall receive an additional bounty of three-eighths of one cent per pound. Section 2 provides that no money shall

be paid upon sugar not containing at least ninety per cent crystallized sugar, nor upon sugar produced from beets for which as much as \$5 per ton shall not have been paid by the producer, nor upon sugar produced from beets raised by a manufacturer of sugar. Means of determining these facts are then provided by the act. Following sections provide in the same manner for bounties upon chicory. Section 8 is as follows: "When any claim arising under this act is filed, verified, and approved by the secretary of state as herein provided, he shall certify the same to the auditor of state, who shall draw a warrant upon the treasurer for the amount due thereon, payable to the party or parties to whom said sum or sums are due." By section 9 of the act it is provided that it shall be in force a period of three years. The pleadings establish that the relator has manufactured sugar and presented proof thereof entitling it to a bounty of \$805. The auditor justifies his refusal to issue a warrant upon two grounds: First, that there is no lawful appropriation out of which such bounties may be paid; and second, that if there be such an appropriation, it is in excess of the power of the legislature to make such expenditures, appropriations for other purposes having exhausted the power. No question is raised as to the general validity of statutes providing for bounties. Of the two questions presented, we find it necessary to consider only the first.

It is conceded that the legislature has not, in any general appropriation act or in any way outside of the particular act already cited, made a provision for the payment of the bounty claimed. It is, however, contended that in the provisions quoted from the act of 1895 there exists an appropriation wherewith to pay the bounty created. It is solely to this question that we direct our attention. It will be observed that the act, in brief, designates the amount of bounty to be paid for each pound of sugar manufactured, provides for the manner of ascertaining the amount of sugar manufactured, and directs the auditor, on production of proof of the

amount, to draw his warrant upon the treasurer therefor. It does not limit in any way the total sum of money to be so expended, and by its terms the act is to endure for a period of three years. By section 19 of article 3 of the constitution it is provided that "each legislature shall make appropriations for the expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriations shall end with such fiscal quarter." By section 3 of article 3 it is provided that the sessions of the legislature shall be biennial, except as otherwise provided in the constitution. By section 22 of article 3 it is provided that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law and on the presentation of a warrant issued by the auditor thereon, and no money shall be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution." Do the provisions of the act under consideration constitute a "specific appropriation" for the purpose designated within the meaning of these constitutional provisions, and did the legislature so intend? The relator contends that, having accepted the provisions of the act by manufacturing the sugar for which it claims the bounty, its relations with the state are contractual, and that the state cannot refuse payment, because to so do would be to impair the obligations of its own contract. There is, however, a broad distinction between the moral, and even in one sense the legal, obligation of a state to make a payment, and the duty or the power of its officers to fulfill that obligation. Under constitutions such as ours an appropriation for the purpose is indispensable to authorize the state's executive officers to make a payment, no matter how great the moral or the legal obligation may be on the part of the state to make such payment. The state being sovereign, while it may incur obligations, there is no method except those by itself established whereby such obligations may be enforced,

and it is in general for the legislature by means of an appropriation to recognize an obligation of the state and permit its enforcement. As said in *Ristine v. State*, 20 Ind., 328: "A promise by the government to pay money is not an appropriation. A duty on the part of the legislature to make an appropriation is not such. A promise to make an appropriation is not an appropriation. The pledge of the faith of the state is not an appropriation of money with which to redeem the pledge. Usage of paying money in the absence of an appropriation cannot make an appropriation for future payment." And, as said by the same court in *Carr v. State*, 127 Ind., 204, while clearly recognizing the obligations of a contract entered into by the state, "there is one essential and far-reaching difference between the contracts of citizens and those of sovereigns, not, indeed, as to the meaning and effect of the contract itself, but as to the capacity of the sovereign to defeat the enforcement of its contract. The one may defeat enforcement but the other cannot. This result flows from the established principle that a state cannot be sued. * * * Nor is this the only method under such a constitution as ours by which a state may defeat the enforcement of its obligation, for the failure to make the necessary appropriation will effectually accomplish that object. * * * The legislature has, therefore, the ability to avoid payment of the obligations of the state by a failure or refusal to make the necessary appropriation, although that body cannot impair the obligation of the contract. Creditors who accept the obligations of the state are bound to know that they cannot enforce their claims by an action against the state directly nor by an action against its officers where no appropriation has been made as the constitution requires." Such citations might be indefinitely multiplied, but the distinction between the obligation of a state to fulfill its contracts and the power of its ministerial officers to fulfill them in the absence of legislative authority is so marked and so well settled that we would not have gone

to this length in pointing it out were it not for the prominence given in argument to the proposition that a contractual relation exists and that therefore it should be enforced in this proceeding. It may be conceded for the purposes of this case that the premises of the relator are sound. Still it does not follow that the writ should issue in the absence of a valid appropriation. The relator contends that the language of the act itself created such an appropriation, and cites authorities for the purpose of establishing that to constitute an appropriation the word "appropriation" or "appropriate" is not essential; that it is sufficient that an intention to make an appropriation is disclosed by the act. This also may be conceded with the qualification that it is the settled law of this state that there can be no implied appropriation. (*State v. Wallichs*, 15 Neb., 609.) By that we understand that an appropriation cannot be implied from the fact that the legislature has by law created an obligation to make a payment. In addition to this it must appear that it has provided for the payment by a constitutional appropriation; in other words, the appropriation must be express, although the expression may be in any language evidencing the intent and need not be in any set form of words. Therefore, we cannot say, because the legislature did not in this act use the word "appropriate" that it does not carry an appropriation. To solve the question we must consider the meaning of the term "appropriation" as used in the constitution, and ascertain whether, in the law, the legislature has evidenced its intention to perform the act designated by that term.

The origin of legislative appropriations is so well known that it seems almost a work of supererogation to here allude to it. Legislative appropriations are the outgrowth of the long struggle in England against royal prerogative. By degrees the power of the crown to levy taxes was restrained and abolished, but it was found that, so long as the crown might at its own discretion disburse the revenue, the reservation to the people through parlia-

ment of the power to raise revenues was not a complete safeguard. Efforts to control the crown in disbursement as well as in the collection of revenues culminated with the revolution in 1688, and since then the crown may only disburse moneys in pursuance of appropriations made by act of parliament. Three evils were at that time felt. In the first place, the use of the realm's revenue for purposes unlawful or distasteful to the people; secondly, the inability to control the crown in the amounts expended for particular objects; and thirdly, the disposition of the crown to avoid encroachments upon its self-asserted prerogatives by dispensing for long periods with sessions of parliament. By requiring appropriations for limited periods it was sought to remedy all three evils—the first two by making appropriations specific in amount and object, and the third by making them for limited periods, so that frequent parliamentary sessions should be absolutely necessary. The first two objects have been the subjects of repeated comment. The third, in view of our constitutional provision for biennial legislative sessions, and limiting the duration of appropriations to the end of the quarter succeeding the following session, justifies us in quoting the following from 2 Hallam, Constitutional History, chapter 15, page 330: "The lords of the treasury, by a clause annually repeated in the appropriation act of every session, are forbidden, under severe penalties, to order by their warrant any moneys in the exchequer, so appropriated, from being issued for any other service, and the officers of the exchequer to obey any such warrant. This has given the house of commons so effectual a control over the executive power, or, more truly speaking, has rendered it so much a participator in that power, that no administration can possibly subsist without its concurrence; nor can the session of parliament be intermitted for an entire year, without leaving both the naval and military force of the kingdom unprovided for." (See, also, Creasy on the Constitution, page 293.) When our governments, state and federal,

came to be established, the requirement of legislative appropriations was adopted from England, along with many provisions having in view the preservation of the liberties of the people, and our own state constitution in the provisions quoted is somewhat more strict and more in accordance with the English practice than either the federal constitution or the constitution of most of the other states. Having in view the origin and history of appropriations as well as the general lexicographic meaning of the word, to "appropriate" is to set apart from the public revenue a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other. This definition cannot be too strict as applied to our own constitution containing the requirement that the appropriations must be specific.) In *Ristine v. State*, 20 Ind., 328, "appropriation" is defined to be "an authority from the legislature given at the proper time and in legal form to the proper officers to apply sums of money out of that which may be in the treasury in a given year to specified objects or demands against the state." In *Clayton v. Berry*, 27 Ark., 129, it is said that "'appropriated by law' means the act of the legislature setting apart or assigning to a particular use a certain sum of money to be used in the payment of debts or dues from the state to its creditors." In *Humbert v. Dunn*, 84 Cal., 57, the court said: "Has the legislature fixed the amount of the claim and designated its payment out of a certain fund? These are the only things necessary to the validity of the appropriation." In *McCauley v. Brooks*, 16 Cal., 11, it is said, "to an appropriation within the meaning of the constitution nothing more is requisite than a designation of the amount and the fund out of which it shall be paid." It will be observed that each of these definitions includes as one of its requisites certainty as to the amount appropriated. In *Stratton v. Green*, 45 Cal., 149, the court said: "By a specific appropriation we understand an act by which a

named sum of money has been set apart in the treasury and devoted to the payment of a particular claim or demand." This definition was quoted with approval by the supreme court of Nevada in *State v. La Grave*, 41 Pac. Rep. [Nev.], 1075. We are not without a judicial definition of the term in our own state. In *State v. Wallichs*, 12 Neb., 467, the court said: "Specific appropriation means a particular, a definite, a limited, a precise appropriation." This definition was approved in *State v. Wallichs*, 16 Neb., 679.

We might well rest the case here, holding that the act in question was not an appropriation because not falling within the definitions of that term as given by our own court, and reinforced by the courts of other states and by a consideration of the history of the subject; but the earnestness and ability with which the case has been presented by the relator, as well as the importance of the interests which it is claimed are affected by this decision, justify us in stating the results of the further investigation which we have made, with the aid of counsel in the case. In *State v. Weston*, 4 Neb., 216, it was held that no appropriation by the legislature was necessary in order to authorize the payment of salaries fixed by the constitution for officers created thereby. The reason was found in section 25 of the schedule, directing the auditor to draw warrants for the payment of such salaries; and it was stated that this provision being contained in the constitution, it operated as a continuing appropriation for that purpose, and was not annulled by the requirement in the same instrument of biennial appropriations for other purposes. This case by no means conflicts with the conclusion we have indicated, because the constitution fixes the amount of the salary and the time of its payment. Shortly afterwards the court, in *State v. Weston*, 6 Neb., 16, held that the rule established in the former case applied only to officers whose offices were created by the constitution, and that for offices created by the legislature a specific appropria-

tion was required. *In re Groff*, 21 Neb., 647, involved incidentally a question as to the validity of an appropriation for the payment of the salaries of district judges. The appropriation bill included a single item for the salaries of district judges of \$95,000. While it was intimated that under section 25 of the schedule of the constitution above referred to a judge might be entitled to the salary in the absence of a legislative appropriation, it was held that this appropriation was sufficient. But it will be observed that it was specific only in its gross amount and in its general object. It is hardly possible that the court would have considered an appropriation of "so much as may be necessary," without fixing any amount, as a valid appropriation were a legislative appropriation necessary. In *State v. Babcock*, 24 Neb., 787, the court considered an act to provide for the selling of unsold lots and lands belonging to the state, in the city of Lincoln, and appropriating the proceeds of such sale to the construction of the capitol. It was held that the lands having been sold under the provisions of that act, there was an appropriation of the amount realized for the purpose designated. It is true that at the time of the passage of this act the amount appropriated thereby was not in dollars ascertained. It was equivalent to the appropriation of the lands themselves, and was limited to the proceeds of those lands. The uncertainty in amount arose not in regard to demands of the claimant to the fund, but in regard to the amount of the fund itself. No discretion was vested in the executive officers as to the amount to be disbursed. There is here a broad distinction. By section 1, article 9, of the constitution the legislature is required to "provide such revenue as may be needful" by levying taxes, etc. It is essential that appropriations shall be limited in amount, in order that the legislature may know what revenue shall be needful, and provide therefor. But when the state has property in its possession there can be no objection to appropriating the proceeds of the sale of that property,

because the value of the property itself limits the appropriation, and no uncertainty arises in regard to the revenue. An appropriation may be specific, according to any of the definitions heretofore given, when its amount is to be ascertained in the future from the collection of the revenue. It cannot be specific when it is to be ascertained only by the requisitions which may be made by the recipients. The case of *State v. Moore*, 40 Neb., 854, much relied on by the relator, is in nowise in point. In that case there was a specific, limited, precise appropriation, in express terms, of a certain sum of money for a certain purpose, and the question was as to the authority of the legislature to appropriate money for that purpose; and further, as to whether the amount designated should control as against the amount justly required. The fact of the appropriation was not contested and was incontestible. The foregoing cases comprise those which it is claimed give color to the relator's contention. We think none of them, in fact, tends in any way to support it. On the other hand, we might cite many cases illustrating how strictly the court has insisted upon express appropriations, in conformity with the constitution, in order to justify an expenditure, among them *State v. Wallichs*, 12 Neb., 407; *State v. Wallichs*, 15 Neb., 457; *State v. Wallichs*, 15 Neb., 609; *State v. Wallichs*, 16 Neb., 679. One case quite closely in point is *State v. Babcock*, 18 Neb., 221. In that case a statute was under consideration whereby it was provided that if any county treasurer shall have paid into the state treasury any greater sum of money than is legally and justly due, the auditor shall issue his warrant for the amount so overpaid, which shall be paid out of the fund or funds so overpaid on said warrant. This act provided as specifically for what purpose the warrant should be drawn, and in whose favor, as the act we are considering. It contained as specific a direction to draw the warrant and it was at least as certain in the amount appropriated; more so, we think, because it must be less than the amount actually received

by the treasurer, while in this case, if we should hold the act to be an appropriation, it might appropriate in itself vastly more than the whole revenue of the state. But the court held that this was not an appropriation and did not justify the drawing of a warrant. The act cannot be treated as an appropriation, therefore, because it is not certain and limited in its amount. It is contended that the circumstances render a limit impossible. If so, it might be an argument against the validity of any appropriations for such a purpose. It cannot be an argument in favor of the validity of this one. But the very fact that the number of pounds of sugar which might be manufactured under the provisions of the act cannot be ascertained in advance renders it the more necessary for the legislature to fix a limit beyond which the expenditure for that purpose may not go. Otherwise it is impossible to provide a revenue with a view to the appropriations made.

It is contended, in answer to the objection that appropriations cannot extend beyond the end of the quarter following the adjournment of the next session of the legislature, that this may be treated as a valid appropriation for that period. But by section 9 of the act it is expressly provided that it shall endure for three years, which would be beyond the constitutional limit. Therefore, the legislature could not have intended the act to operate as an appropriation; or, if it so intended, it transgressed its powers, and, the period provided for being an important element, this invalid portion of the act must be held to have operated as an inducement to its passage, and therefore would, if construed as an appropriation act, invalidate the whole measure.

Some of the decisions of other states seem at first blush to conflict with some of the views herein expressed, but we think the conflict is more apparent than real. Thus, in many states there is no provision by constitution limiting the duration of appropriations. Accordingly it is, in such states, held that general acts of the legislature

creating an obligation of the state and fixing the amount to be paid may operate as a continuing appropriation. As, for instance, in Colorado, *In re Continuing Appropriations*, 18 Colo., 192; in Alabama, *Nichols v. Comptroller*, 4 Stew. & P. [Ala.], 154, and *Reynolds v. Taylor*, 43 Ala., 420; in Wyoming, *State v. Burdick*, 33 Pac. Rep. [Wyo.], 125. In this class fall all those cases which hold that a statute creating an office and fixing the salary constitutes a continuing appropriation for its payment. Again, it is held in some states that an appropriation may be implied. In these states the constitution does not require all appropriations to be "specific," and that doctrine is contrary to the decisions of this court. So, too, in states having similar or somewhat similar provisions to our own, implied, indefinite, and continuing appropriations have been enforced on the ground that they were made by the territorial legislatures, and that the state constitutions were not retroactive in their effect. Such seems to be the doctrine in Montana and South Dakota. In Illinois an act of the legislature appropriated the proceeds of a certain tax to a particular purpose. It was held that this was sufficient, although the amount to be derived from such tax was then unknown. (*People v. Miner*, 46 Ill., 384. See, also, *State v. Hipple*, 64 N. W. Rep. [S. Dak.], 120.) The remarks made with reference to *State v. Babcock*, 24 Neb., 787, are applicable to this class of cases. But Kansas, under constitutional provisions like our own, holds otherwise. (*Martin v. Francis*, 13 Kan., 220.) In no case, however, which we have been able to discover, under any constitutional provision has it been held that an appropriation is valid when it is uncertain in its amount, and that uncertainty arises with regard to the extent of the demands or claims which the recipients of the fund may present against it. On the other hand, in nearly all the cases cited, and in many more which might be cited, among them a long line of California cases, wavering in other respects, but always steadfast in this, certainty in amount is treated as an

essential requisite of a valid appropriation. We are not without the aid of a construction placed on acts similar to this by the other departments of the government. We are aware that such construction is not conclusive, but when the legislature, in framing an act, resorts to language similar in its import to the language of other acts, which have received a practical construction by the executive departments and by the legislature itself, it is fair to presume that the language was used in the later act with a view to the construction so given the earlier. In 1877 there was passed (Session Laws, 1877, p. 213) an act "to provide for the payment of bounties for the destruction of wild animals in the state of Nebraska." This act provided, in brief, that any person killing wolves, wild cats, or coyotes within the state, and presenting the scalps thereof to the clerk of the county in which the same were killed, with other proof, should be entitled to a bounty of \$1 for each of such animals so killed. It was provided that the county clerk should issue a certificate to the person entitled, and that upon the same being filed with the auditor, "said auditor shall draw his warrant on the treasury of the state, against the general fund, for the amount of such certificate, in favor of the person named therein or his assignee." It has never been assumed that this act operated as a continuing or even a temporary appropriation of money wherewith to pay such bounties. Appropriations to fulfill the purpose of the act have since its passage been made in certain years, and in one year at least, to-wit, 1889 (Session Laws, 1889, p. 611), the appropriation was made to cover not only future bounties, but outstanding claims, the previous legislature having failed to make any appropriation. It is a matter of general knowledge that payments of such bounties have been made when express appropriations existed, and not at other times. In 1875 (Session Laws, p. 156) an act was passed providing a bounty for the discoverer of a vein of coal, and providing, also, that warrants should be issued in payment thereof.

Once, at least, an item for the payment of such bounties has been included in the general appropriation bill.

We conclude that the provisions of the act in question do not make an appropriation. At most, they create an obligation and provide for the manner of its satisfaction when appropriation shall be made. It was not the intention of the legislature to make an appropriation by the act, and if it had been its intention so to do, such appropriation would be void for uncertainty in amount, and because it transgressed the constitutional limit of time.

WRIT DENIED.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1897.

PRESENT:

HON. A. M. POST, CHIEF JUSTICE.

HON. T. O. C. HARRISON, } JUDGES
HON. T. L. NORVAL, }

HON. ROBERT RYAN, } COMMISSIONERS
HON. JOHN M. RAGAN, }
HON. FRANK IRVINE, }

WESTERN WHEELED SCRAPER COMPANY V. F. J.
SADILEK.

FILED JANUARY 7, 1897. No. 6962.

1. **Bank Checks: PRESENTMENT.** A customer's bank check is not intended for circulation as a medium of exchange, and should be presented for payment with the dispatch consistent with the circumstances of the case and the transaction of other commercial business. (*First Nat. Bank of Wymore v. Miller*, 37 Neb., 500.)
2. ———: ———: **COLLECTION: NEGLIGENCE: AGENCY.** A bank which undertakes the collection of a customer's check is guilty of negligence in sending it for payment direct to the drawee bank, provided there is in the same town another bank in good standing.
3. ———: ———: **PAYMENT: NOTICE.** A bank receiving for collection a customer's check is required to pay the same upon the receipt thereof during business hours, or to promptly give notice of its dishonor in order to charge the drawer and indorsers thereof.
4. ———: ———: ———: ———. *Held*, from an examination of the

evidence, that prejudice to the defendant as drawer of the check which is the subject of controversy will be presumed from the failure to give notice of its dishonor, there being to his credit therein sufficient funds for its payment, the drawee bank having in the meantime become insolvent.

5. **County Treasurers: BANK DEPOSITS: COLLATERAL ATTACK.** The authority of a county treasurer to deposit for safe keeping in bank the funds entrusted to his care cannot be questioned in a strictly collateral proceeding.

ERROR from the district court of Saline county. **Tried** below before HASTINGS, J. *Affirmed.*

The opinion contains a statement of the case.

Hastings & McGintie, for plaintiff in error:

Whether there was due diligence in presenting the check for payment was a question for the jury. (*Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *Atchison & N. R. Co. v. Bailey*, 11 Neb., 332; *Sioux City & P. R. Co. v. Stout*, 17 Wall. [U. S.], 657; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich., 99; *Fox v. Spring Lake Iron Co.*, 50 N. W. Rep. [Mich.], 872; *Jucker v. Chicago & N. W. R. Co.*, 8 N. W. Rep. [Wis.], 862; *Dailey v. Linnehan*, 40 N. W. Rep. [Minn.], 250; *Park v. O'Brien*, 23 Conn., 338; *Paine v. Kohl*, 14 Neb., 580.)

Plaintiff was entitled to recover the amount claimed in the petition. (*Friberg v. Cody*, 20 N. W. Rep. [Mich.], 813; *Nebraska Nat. Bank v. Logan*, 29 Neb., 278.)

A county treasurer can only pay county obligations in cash. (*Cedar County v. Jenal*, 14 Neb., 254; Compiled Statutes, ch. 18, secs. 91, 92; *State v. Keim*, 8 Neb., 67; *First Nat. Bank v. Gandy*, 11 Neb., 431.)

F. I. Foss and W. R. Matson, contra:

Plaintiff was bound to present the check within a reasonable time. (*Woodruff v. Plant*, 41 Conn., 344; 3 Randolph, Commercial Paper, sec. 1103; Chitty, Bills, 333, 435; *Smith v. Janes*, 20 Wend. [N. Y.], 192; *First Nat. Bank of Wymore v. Miller*, 37 Neb., 500.)

The Aurora bank was responsible for the negligence of its agent, the drawee, Bank of Western. (Morse, Banks & Banking, secs. 236, 271; *National Bank of Pawnee v. Sprague*, 34 Neb., 318; *Merchants Nat. Bank v. Goodman*, 109 Pa. St., 422; *Drovers' Nat. Bank v. Anglo-American Packing & Provision Co.*, 117 Ill., 100; *Titus v. Mechanics Bank*, 6 Vroom [N. J.], 588; *Whitney v. Esson*, 99 Mass., 308; *Briggs v. Central Nat. Bank*, 89 N. Y., 182; *Charlotte Iron Works v. American Exchange Bank*, 34 Hun [N. Y.], 26; *Hyde v. First Nat. Bank*, 7 Biss. [U. S.], 156; *Ætna Ins. Co. v. Alton City Bank*, 25 Ill., 243; *Stacy v. Dane County Bank*, 12 Wis., 629; *Fabens v. Mercantile Bank*, 23 Pick. [Mass.], 330; *Strong v. King*, 35 Ill., 11.)

POST, C. J.

This was an action by the Western Wheeled Scraper Company, hereafter called the plaintiff, against F. J. Sadilek, hereafter called the defendant, in the district court for Saline county. A trial was had of the issues joined by the pleadings, resulting in a verdict for the defendant in accordance with the peremptory direction of the court. A motion for a new trial having been overruled and judgment entered upon the verdict so rendered, the cause has been removed into this court for review upon allegations of error by the plaintiff company.

Among the facts established by the pleadings and proofs, and as to which there is no dispute, are the following, viz.: On the 15th day of June, 1891, a county warrant was in due form issued to the plaintiff for \$330, being the amount of a claim previously allowed and payable out of the road fund of Saline county. On the 10th day of August, 1891, the plaintiff company, whose place of business was in the city of Aurora and state of Illinois, addressed to John N. Van Duyn, county clerk of said county, the following communication:

"*John N. Van Duyn, County Clerk, Wilber, Neb.*—DEAR SIR: Our Mr. Arnett informed us some time ago that your county had allowed our claim for \$330. * * *

If the warrant has been issued, we hereby authorize you to receipt for warrant. If there is money on hand to pay the warrant, kindly send us draft for the am't. If not prepared to pay, please have warrant presented and registered so that it will be paid in its turn. We enclose bill herewith. Yours truly,

"WESTERN WHEELED SCRAPER CO."

On August 12, 1891, said warrant was by Mr. Van Duyn, as agent for the plaintiff company, presented for payment to the defendant as county treasurer and indorsed "Not paid for want of funds," and afterward on the same day the defendant, as county treasurer, drew his check to the order of plaintiff for the sum of \$330, upon the Bank of Western, situated at the village of Western, in said county, and in which he, as such county treasurer, had then ample funds. Mr. Van Duyn, to whom said check was delivered, on the day of its date, forwarded the same to the plaintiff, who received it through the mail at Aurora on the 14th day of August. On the succeeding day, to-wit, August 15, the check in question was by the plaintiff deposited in the Second National Bank of Aurora, by which it was on the same day forwarded for collection and returned to the Bank of Western. Said check was on the 17th day of August received by the Bank of Western and has not been paid, although said bank continued open for the transaction of business until August 19, on which day it was closed by order of the state banking board, and is now insolvent. The village of Western is situated about twenty miles distant from Wilber, the defendant's home, and about five hundred miles from the city of Aurora. It has railroad and telegraph connection with both places named, and there was at the date in question another bank thereat in good standing. In addition to the foregoing, it is shown that the time required for the transmission of letters by mail between Aurora and Western does not exceed twenty-four hours, from which the inference necessarily arises that the check forwarded by the Aurora bank on the 15th was

received by the Bank of Western during business hours on the 17th.

Is the defendant in this action answerable for the loss resulting from the failure of the last named bank? We think not. There is eminent authority for the proposition that a bank which undertakes the collection of a customer's check is guilty of inexcusable negligence in sending it direct to the drawee bank instead of through the agency of a third person, provided loss ensue through the failure of such drawee. (*Merchants Nat. Bank v. Goodman*, 109 Pa. St., 422; *Drovers Nat. Bank v. Anglo-American Packing & Provision Co.*, 117 Ill., 100; *Anderson v. Rodgers*, 53 Kan., 542; *First Nat. Bank of Corsicana v. City Nat. Bank of Dallas*, 34 S. W. Rep. [Tex.], 459; *German Nat. Bank v. Burns*, 12 Colo., 539; *First Nat. Bank of Evansville v. Fourth Nat. Bank of Louisville*, 6 C. C. A., 183; 1 Daniel, *Negotiable Instruments*, sec. 328a.) The principle recognized in the foregoing authorities is that no party, whether a corporation, firm, or individual, can, in contemplation of law, be deemed a suitable agent to enforce in behalf of another a claim against itself. But independent of the rule there stated, the defendant was discharged in consequence of the negligence of plaintiff's chosen agent, the Bank of Western. A customer's check is, in the first place, not designed for circulation as a medium of exchange, and should be presented for payment with the dispatch and diligence consistent with the circumstances of the case and the transaction of other commercial business. (*First Nat. Bank of Wymore v. Miller*, 37 Neb., 500.) In the second place, it was the duty of the drawee bank to promptly pay the check upon receipt thereof for collection, or to give notice of its dishonor, in order to charge the drawer and indorsers. (*Wood River Bank v. First Nat. Bank of Omaha*, 36 Neb., 744.) Time may be necessary, it is true, for the drawee bank to examine its books in order to ascertain the condition of the drawer's account, but in the absence of evidence to the contrary it will be presumed that the officers

of the bank were aware of the fact conclusively established by the record, viz., that the defendant had therein to his credit at all times from the 12th to the 19th of August, inclusive of both dates, ample funds for the payment of the amount called for. The check was, therefore, as held in *Wood River Bank v. First Nat. Bank of Omaha, supra*, dishonored on the 17th, and the defendant, as drawer, was entitled to notice by the first regular mail, on the 18th. (3 Kent, Commentaries, 105; 1 Daniel, Negotiable Instruments, sec. 1039, and cases cited.) It is no answer to say that the defendant is not prejudiced by the neglect to give notice, since he might, had he been promptly advised of the non-payment of his check, by means of legal process have anticipated the impounding of the bank by the state, and for the further reason that it is an implied condition of the contract of the drawer or indorser that he shall be promptly notified of the non-payment or non-acceptance of the bill.

Counsel for the plaintiff indulge in some criticism upon the action of the defendant on account of the deposit in bank of the county funds, and the payment of the warrant after having been indorsed "Not paid for want of funds." To the first criticism a sufficient answer is that neither the validity nor propriety of the defendant's action in depositing the funds entrusted to his care can be questioned in this collateral proceeding. The other circumstance which is made the subject of criticism, although not material to the issues, is explained by the fact that the road fund, against which plaintiff's account was chargeable, was overdrawn at the date of the warrant, and that said warrant was, with plaintiff's knowledge and consent, paid by the defendant out of other funds belonging to the county. There is no error in the record and the judgment is

AFFIRMED.

EDWARD G. RYLEY, APPELLEE, V. JACOB SANDEAN,
APPELLANT.

FILED JANUARY 7, 1897. No. 6991.

Alley: NOTICE OF EXISTENCE: CONFLICTING EVIDENCE. The evidence in this case, although conflicting, *held* sufficient to sustain the decree appealed from.

APPEAL from the district court of Douglas county.
Heard below before FERGUSON, J. *Affirmed.*

George A. Magney, for appellant.

C. A. Baldwin, *contra*.

POST, C. J.

This is an appeal from the decree of the district court for Douglas county, the question at issue being the existence of an alleged alley in block 14, Walnut Hill Addition to the city of Omaha. Among the facts disclosed by the pleadings and proofs are the following: Some time during the year 1885 the plaintiff Ryley, Edholm, the defendant's grantor, and one Hunt, being the owners of a tract or parcel of land situated in the northeast corner of said block, agreed to so divide the same as to make three residence lots fifty feet in width, fronting on Lowe avenue on the east, by two hundred and fifty feet in length. Pursuant to such agreement said property was subdivided and subsequently improved by the several owners. The corner lot adjoining La Fayette avenue on the north was allotted to Edholm, the south lot, adjoining an alley extending east and west through said block, was assigned to Hunt, and the inside or middle lot to the plaintiff. Afterwards said parties, being desirous of access to their property by means of an alley on the west side thereof, executed the following agreement:

“OMAHA, NEB., —, 1885.

“This agreement, entered into between the under-

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signed, their heirs, executors, administrators, and assigns, witnesseth: That whereas P. L. Edholm, Charles G. Hunt, and E. G. Ryley having negotiated with and purchased from the Walnut Hill Building Association, an association legally and lawfully incorporated in the city of Omaha and state of Nebraska, three lots, to-wit, lots 2, 3, and 4, in block 14, said Walnut Hill, and the afore-said Edholm, Hunt, and Ryley, being in lawful and peaceable possession of said real estate, do hereby covenant and dedicate the one to the other, ten feet of lot 4, in block 14, to be used by them and their successors as a private alley.

"In witness whereof, we have hereunto set our hands and seals this 8th day of July, 1886.

"CHARLES G. HUNT.

"P. L. EDHOLM.

"ED G. RYLEY."

The foregoing instrument appears to have been acknowledged in due form on the 8th day of July, 1886, and filed for record on the 18th day of April, 1891. It should be observed in this connection that the description therein employed has reference to the original subdivision of the property in question. It is alleged by the plaintiff that upon the execution of the agreement above set out there was a dedication in fact by each party of a strip of ground ten feet in width to the purpose therein contemplated; and the evidence in the bill of exceptions tends strongly to prove that stables and fences were constructed by said parties on the east line of the alley so laid out. That the evidence establishes a sufficient dedication as against Edholm and Hunt is a proposition not controverted on this appeal. It is, however, asserted by the defendant that he acquired title by purchase from Edholm, without notice, actual or constructive, of the plaintiff's claim in the premises. The deed through which defendant claims title bears date of March 9, 1887, and was filed for record March 19, 1887, or more than four years previous to the filing for record of the agree-

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ment aforesaid. There is, accordingly, no foundation for the contention that the defendant had constructive notice of the plaintiff's rights. The evidence bearing upon the question of actual notice is conflicting, although, in our judgment, ample to sustain the finding adverse to the defendant, and the decree perpetually enjoining him from obstructing said alley or interfering with the plaintiff's use or enjoyment thereof will be affirmed.

DECREE AFFIRMED.

FLOYD HARSHMAN V. WILLIAM A. ROSE.

FILED JANUARY 7, 1897. No. 6973.

1. **Assault and Battery: DAMAGES: PLEADING.** It is, in a civil action for assault and battery, unnecessary to specially allege such damages as are the necessary and usual consequence of the act complained of.
2. ———: ———: ———. A petition charging the defendant with unlawfully beating and wounding the plaintiff on the head with a pitchfork whereby he, plaintiff, "was wounded and is, and for a long time will be, sick, and has suffered, and will suffer, great bodily pain and discomfort," states a cause of action for such physical and mental suffering as is the natural and proximate result of the wrong so alleged. (*American Water-Works Co. v. Dougherty*, 37 Neb., 373.)
3. ———: JUSTIFICATION. One who has commanded an intruder to leave his premises is authorized to use such means as may be reasonably necessary to enforce his command. But if in so doing he exceed the bounds of reasonable force he will be guilty of an assault.
4. ———: ———: VERDICT FOR PLAINTIFF: EVIDENCE. Evidence examined, and held to sustain the judgment of the district court.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J. *Affirmed.*

Wooley & Gibson, for plaintiff in error.

A. N. Sullivan and J. E. Douglas, contra.

Post, C. J.

Rose, the defendant in error, recovered judgment against the plaintiff in error, Harshman, in the district court for Cass county on account of an alleged assault and battery. In the proceeding by means of which said judgment is presented to this court for review especial prominence is given to those assignments which challenge the sufficiency of the petition below as a basis for the recovery of other than the special damage therein alleged, to-wit, \$8 expended for medical attendance in consequence of the assault charged. The petition assailed, which is very brief, is here set out, omitting caption and formal parts: "On the 3d day of August, 1891, in Cass county, and state of Nebraska, he, the defendant, unlawfully made an assault upon the plaintiff and him, the said plaintiff, did then and there beat, wound, and ill treat by striking plaintiff several blows on the head with a pitchfork; that plaintiff thereby was wounded and is, and for a long time will be, sick, and has suffered and still suffers great bodily pain and discomfort from said wounds; that plaintiff was disabled thereby from attending to his business for more than two weeks thereafter; that in the treatment and necessary care of said wound he has been compelled to pay for physician's services the sum of \$8; that he has been injured in the premises in the sum of \$1,000." It is in an action for assault and battery necessary to specially allege such damages only as the law does not presume to be the necessary or usual consequence of the act complained of. (2 Greenleaf, Evidence, sec. 89; 1 Chitty, Pleading, p. 428; 1 Kinkead, Code Pleading, sec. 221; 2 Ency. of Pl. & Pr., 862.) Tested by the rule thus stated, the plaintiff below was entitled to recover for such physical and mental suffering as was the natural and proximate result of the wrong complained of, and was not restricted to the damage alleged. (*American Water-Works Co. v. Dougherty*, 37 Neb., 373.)

The only other assignment requiring notice is that which relates to the fifth instruction given on the court's own motion. It is argued that certain expressions therein employed are unwarranted by the evidence, and also misleading, because intimating to the jury that the plaintiff below was lawfully upon the premises of the defendant where, it is alleged, the assault was committed. But the instruction, if erroneous, is error without prejudice, even assuming the plaintiff to have been a trespasser at the time of the assault. The defendant's version of the affair appears from a single question and answer, viz.: "Q. What then occurred? A. I was at work on my place and he (plaintiff) came and asked me for the scraper. I told him that I had no scraper for him and told him to get off my place. I cannot relate all the words that passed between us. Anyway I ordered him to get off my place and he said that he did not have to. He was on the north side of the stack and as he said that, I jumped over the stack and run to where he was and struck him over the head with my fork. His horse then turned and I hit him over the back." One who has commanded an intruder to leave his premises is authorized to use such means as may be reasonably necessary to enforce his commands. He must not, however, in so doing exceed the bounds of reasonable force, else he will be guilty of an assault. (*Everton v. Esgate*, 24 Neb., 235; 2 Wharton, Criminal Law [10th ed.], sec. 624; 2 Am. & Eng. Ency. of Law [2d ed.], p. 984.) We do not hesitate to assert as a proposition based upon the defendant's own testimony that the striking of the plaintiff on the head with a pitchfork upon the simple refusal of the latter to leave his, defendant's, premises, was an act of violence wholly unwarranted by the circumstances of the case. It follows from this view of the record that the question whether the plaintiff was a trespasser at the time of the injury charged is foreign to the real issue presented.

JUDGMENT AFFIRMED.

JAMES CHAPPELL, APPELLANT, v. WILLIAM H. SMITH ET AL., IMPLEADED WITH MICHIGAN SAVINGS & LOAN ASSOCIATION, APPELLEE.

FILED JANUARY 7, 1897. No. 7463

Stipulation as to Effect of Appeal: INTEREST: JUDGMENT. *Held, From an examination of the record, that the decree complained of is warranted by the judgment of this court on a former appeal and agreement of parties made pending such appeal.*

APPEAL from the district court of Sheridan county. Heard below before BARTOW, J. *Affirmed.*

Allen G. Fisher, for appellant.

Albert W. Crites, contra.

POST, C. J.

This is an appeal by the plaintiff from so much of a decree of the district court for Sheridan county as allows interest upon the amount due the Michigan Savings & Loan Association, pending an appeal by the latter from the original decree of foreclosure. The proceeding as instituted by the plaintiff was to enforce a mechanic's lien for labor and material furnished in the erection of a certain building in the village of Hay Springs, in said county. A decree was in due time entered, by which the equities of the plaintiff and the several defendants were determined and from which the Michigan Savings & Loan Association prosecuted an appeal to this court. The appeal thus taken resulted in an order so modifying the decree below as to give the mortgage of the appellant priority over the lien of the plaintiff, and remanding the cause with direction to determine the equities of the parties affected, in accordance with the opinion therein filed. (See *Chappell v. Smith*, 40 Neb., 579.) The district court, as we infer from the briefs of counsel, upon the entry of

a second decree awarded interest in favor of the appellee association upon its mortgage debt, from the date of the original finding, to which the plaintiff excepted, and which, as already intimated, is the ground of complaint on this appeal. By agreement of parties the property which was the subject of controversy was sold pending the former appeal and the sale thereof confirmed as per stipulation, without prejudice to the rights of the appellant therein named, the proceeds of such sale, amounting to \$1,500, being returned into court for distribution in accordance with the final decree in the cause.

It is argued that the second decree is erroneous (1) because the property in question was purchased by the savings and loan association through its trustee, John B. Corliss; (2) because said association having acquired title to the property, by means of its supersedeas undertaking, prevented enforcement of other liens thereon during the pendency of its appeal. It is not, according to our understanding of the record, necessary to pursue the subject by inquiring what would have been the equities of the parties in the absence of the stipulation to which reference has been made. It is sufficient for the purpose of the case actually presented that the parties in interest expressly stipulated for the sale of the property and confirmation thereof, notwithstanding the supersedeas undertaking of the defendant association; that such sale should be without prejudice to the rights of any party to appeal from the original decree; and that any party to such decree might purchase the property and receive a deed therefor. It was by said agreement further recited that the intention thereof was "to substitute the proceeds of such sale for the property affected by the decree and to hold said proceeds in court until the priorities of the parties and their rights thereto respectively may be finally determined." The necessary inference from the record is that the defendant association, as purchaser of the mortgaged property, advanced the full consideration therefor in cash, and that as such pur-

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chaser its relation to the plaintiff and its co-defendants is that of a stranger to the decree. The rights of the parties were, according to their agreement, unaffected by the sale of the property pending the appeal, and it is not apparent to us in what manner the plaintiff as the holder of a subordinate lien can be prejudiced by a finding and decree in favor of the defendant association for the amount admitted to be due by the terms of its mortgage. Nor is the fact that the plaintiff was prevented from enforcing its lien pending the appeal to this court at all material, since the liability of the defendant association therefor as the appellant is measured by the terms of the supersedeas undertaking given by it.

DECREE AFFIRMED.

ASHLAND LAND & LIVE STOCK COMPANY V. ELEVEN
WOODFORD.

FILED JANUARY 7, 1897. No. 6933.

Trial: COUNTER-CLAIM: PLEADING. Where, to a counter-claim well pleaded, the plaintiff interposes no reply, a verdict in his favor in excess of the amount claimed in his petition, less the amount of such counter-claim, should be set aside as unsupported by the pleading.

ERROR from the district court of Saunders county.
Tried below before BATES, J. *Reversed.*

Simpson & Sornborger, for plaintiff in error.

O. C. Tarpinning, *contra.*

POST, C. J.

The defendant in error, Woodford, as plaintiff in the district court for Saunders county, alleged as his cause

of action against the Ashland Land & Live Stock Company, plaintiff in error herein, a lease for one hundred acres of land in said county during the year 1891. It was provided by said lease, a copy of which is set out in the petition below, that the proceeds of the grain and hay grown upon said premises to the amount of \$250 should be and remain the property of the lessor, and that the crops in excess of the rents so reserved should belong to the lessee, who was to have the use and occupancy of the building situated upon the premises during the term of the lease. It was further alleged as a cause of action that the defendant company, during the existence of said lease, without the plaintiff's consent, entered said premises and carried away and converted to its own use corn grown thereon of the value of \$40.50; that the defendant negligently permitted its cattle to trespass upon said premises during the said term and injure the crops growing thereon, to the plaintiff's damage in the sum of \$50; that the defendant was indebted to the plaintiff for four tons of hay grown upon said premises of the agreed value of \$12; and that the plaintiff was indebted to the defendant in the sum of \$1.50 on account of board furnished the servants of the latter in the year 1891. Accompanying the petition was a prayer for judgment in the amount of the several items above enumerated, to-wit, \$104. The answer admitted the execution of the lease set out and denied the other material allegations of the petition. There was also a counter-claim, in which the account between the parties was thus stated:

"ELEVEN WOODFORD, -

"TO THE ASHLAND LAND & LIVE STOCK CO.

Dr.

To interest in crop for 1891, as per agreement..	\$250 00
To money advanced per check.....	14 00

\$264 00

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	Cr.
By 214 bushels corn.....	\$55 90
By 51 tons hay.....	153 25
By error in number of acres described in lease	9 50
	\$218 65

“Balance, for which judgment was de-
manded \$45 35”

To the counter-claim so made there was no reply; hence the statement of the account therein must be taken as true. If we add to the sum with which the plaintiff is there credited the full amount claimed in his petition, to-wit, \$104, we find he was entitled to a credit of \$322.65 and that he was chargeable with the sum of \$264. He was, in other words, according to the most favorable construction of the pleadings, entitled to judgment in the sum of \$58.65 only, whereas a verdict was returned in his favor for the full amount claimed, upon which judgment was subsequently entered over the objection of the defendant company.

The foregoing statement renders unnecessary an examination of the other assignments, particularly in view of the fact that they present questions of practice only and it is not apparent that the determination thereof would materially assist the district court in a second trial of the cause. The judgment complained of being unsupported by the pleadings, the cause is reversed and remanded for further proceedings in the district court.

REVERSED.

HARRISON H. BLODGETT V. STATE OF NEBRASKA.

FILED JANUARY 7, 1897. No. 8465.

1. **Indictment and Information: OBJECTIONS.** A motion or objection directed to an indictment or information as a whole will be overruled unless applicable to each count thereof.
2. —: **DUPLICITY: ATTORNEYS: MALPRACTICE: CONTEMPT.** A charge of malpractice against an attorney and counselor at law may be joined with a prosecution for a contempt of court where both charges involve a single transaction.
3. **Contempt: FINDING: REVIEW.** A finding without a judgment in a summary prosecution for contempt of court will not be reviewed by means of proceedings in error.
4. **Indictment and Information: TEST OF SUFFICIENCY.** The test by which to determine the sufficiency of an indictment is whether enough remains after rejecting all unnecessary averments thereof to satisfy the requirements of the statute.
5. —: **REMEDY OF ACCUSED.** The remedy of the accused in an indictment or information is by plea and not by motion to strike unnecessary and immaterial allegations.

ERROR to the district court for Lancaster county.
Tried below before HALL, HOLMES, and CORNISH, JJ.
Modified.

James E. Philpott, for plaintiff in error.

A. S. Churchill, Attorney General, *George A. Day*, Deputy Attorney General, and *W. H. Woodward*, County Attorney, for the state.

POST, C. J.

The plaintiff in error was prosecuted in the district court for Lancaster county by means of an information presented by the county attorney, in which he is by the first count charged with a constructive contempt of court, in the willful attempt to hinder the due administration of justice in a proceeding pending before said court, and by a second count thereof with malfeasance as an at-

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torney and counselor at law under the provisions of section 6, chapter 7, Compiled Statutes, entitled "Attorneys." The allegations of the first count which are deemed material to the present inquiry are, in substance, as follows: The plaintiff in error, on the 24th day of October, 1895, being the defendant in an action then pending and on trial in said court, in which the Lincoln Savings Bank was plaintiff, willfully conspired with one Wenzel to corrupt certain jurors previously impaneled and sworn to try the issues in said cause; that pursuant to such conspiracy, and with the knowledge and procurement of the plaintiff in error, said Wenzel approached one of the jurors so engaged in the trial of said cause and with money furnished for such purpose by the plaintiff in error treated said juror to intoxicating liquors, and at said time requested him, the said juror, to "stand for Blodgett," meaning thereby that said juror should in said cause endeavor to secure a verdict favorable to the plaintiff in error. The second count differs from the first in one respect, viz.: the plaintiff in error is therein described as an attorney and counselor at law, engaged in the practice of his profession in the courts of this state, and it is charged that the acts above enumerated were done by him as such attorney and counselor at law, with intent, corruptly, to influence and deceive the district court in the disposition of the cause above mentioned. Upon the filing of said information the plaintiff in error, who had in the meantime been arrested in obedience to a *capias* issued by order of court, was, on his own request, allowed time within which to plead thereto. He subsequently interposed motions to strike portions of each count, and to quash each count of the information, on the ground of misjoinder, which motions were in turn overruled, as were also demurrers to the several counts. He thereupon filed an answer denying *seriatim* the material allegations of the information, and demanding that he be discharged and the proceeding against him dismissed, which motion was likewise overruled. Having refused

to plead further, a plea of not guilty was entered by order of court, which was followed by a hearing and general finding of guilty as to each count of the information, upon which judgment was entered disbarring the accused from practice as an attorney and counselor before the district court for the third judicial district, and committing him to the custody of the sheriff until payment of the cost of prosecution, taxed at \$——.

In this proceeding to review the judgment thus rendered we will, for convenience, first notice the assignments which present the refusal to dismiss the information upon the filing of the answer to which reference has been made. It has been held that in all prosecutions for contempt arising out of proceedings in common law actions, or which are cognizable by courts of law as distinguished from courts of equity, the answer of the accused unequivocally denying the alleged contemptuous act, unless committed in *facie curiæ*, is conclusive in his favor. (4 Ency. of Pl. & Pr., p. 795, and cases cited.) But the applicability of that rule to our practice is a question not presented by this record, since the motion was directed to the information as a whole and not merely to the charge of contempt. The argument of the plaintiff in error, so far as it relates to this branch of the case, appears to rest upon the assumption that a proceeding for the disbarment of an attorney is in effect a prosecution for contempt of court, and governed by the rules of practice incident thereto. The fact that a contempt may and in practice frequently has been held to be sufficient ground for disbarment has no doubt led to some confusion upon the subject, although the source of jurisdiction in the two classes of cases, as well as the end to be subserved by the respective proceedings, is essentially different. A contempt by a licensed attorney may, and indeed frequently does, constitute grounds for disbarment, but it by no means follows that cause for disbarment, of necessity, amounts to a contempt. The distinction between the two proceedings is thus correctly

stated by the supreme court of Colorado: "The purpose of proceedings for contempt and those for disbarment, and the powers and duties of courts in connection therewith, must not be confused. The former may be termed a police regulation or power for the protection of the court from present direct interference and annoyance in a trial or proceeding taking place before it; the latter is intended to protect, generally, the administration of justice, to save the legal profession from degradation by unworthy membership, and to guard the interests of litigants against injury from those entrusted with their legal business. The power to act in connection with the former is lodged in the court before or against whom the offense is committed; authority to proceed in the latter is possessed exclusively by the tribunal authorized to grant licenses admitting to the profession; the former is punished by fine or imprisonment, and in many instances the proceeding is summary and largely *ex parte*; the sole penalty in connection with the latter is a prohibition from practicing in courts of record, and this judgment can only be entered upon notice of the charge preferred and a full hearing in defense; ample time for preparation being given and all legitimate defenses being allowed and considered." (*People v. Green*, 7 Colo., 244.) Whatever might have been the merits of the objection had it been confined to the charge of contempt alone, it was, as directed to the information as a whole, not well taken, and the order overruling it is accordingly free from error.

Much has been said in argument respecting the joinder of the proceeding for disbarment with the prosecution for contempt. We are, however, unable to perceive any substantial objection to the practice complained of. There was, it should be observed, no motion or request for an order requiring the county attorney to elect between the two counts of the information. Where two or more distinct felonies, arising out of different transactions, are charged in the same indictment or information, the prosecutor will, on motion of the accused, be required to elect

upon which he will proceed. Such objection must, however, be made before trial and verdict, otherwise it will be waived. (*Thompson v. People*, 4 Neb., 524; *Aiken v. State*, 41 Neb., 263.) But the information in this case is, we think, free from the vice imputed to it. Where different criminal acts constitute parts of the same transaction, they may be joined in the same indictment or count thereof. "There are," as said in *Aiken v. State*, *supra*, "many illustrations of this rule, among which are burglary and larceny. It is permissible to charge a burglary only, as that the accused broke and entered with intent to steal property, and also a larceny, as that he then and there stole the property described; and such an indictment will sustain a conviction for either of the crimes so charged." If we concede, for the purpose of this discussion, that the inhibition against the joinder of distinct offenses is applicable to summary proceedings of the character here involved, it by no means follows that there is in this instance a transgression of the rule stated. It is, on the contrary, obvious that the two counts refer to the same transaction, of which the district court might have taken cognizance whenever brought to its attention by information or otherwise. And the statement in the second count of the plaintiff in error's character as an attorney and counselor at law is, we have no doubt, permissible under the rule recognized in *Aiken v. State*, 41 Neb., 263. But the objection is, at this time, without force for another reason. Although the finding apparently includes both counts of the information, the judgment is responsive to the second count, and the penalty imposed is that prescribed by section 6, chapter 7, Compiled Statutes, viz.: The disbarment of the accused as an attorney and counselor at law. The record, therefore, so far as it relates to the alleged contempt, unaffected by the charge of malfeasance as an attorney, like that of a verdict without a final judgment, cannot be made the subject of a review by means of a petition in error.

The remaining questions relate to the refusal of the dis-

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trict court, on the motion of the plaintiff in error, to strike portions of the information. To set out at length the allegations assailed would result in the unwarranted prolonging of this opinion. They are, it may be conceded, matters of detail only, unnecessary in the statement of the offenses sought to be charged, and which should be rejected as mere surplusage. Unnecessary minuteness of description may operate to the prejudice of the prosecution, since no allegation, necessary or unnecessary, descriptive of that which is legally essential to the charge of the indictment can be rejected as surplusage." (1 Bishop, Criminal Procedure, sec. 485.) But, in general, unnecessary averments in an indictment or information "may be treated as mere waste material, to pass unnoticed, and having no legal effect whatever." (1 Bishop, Criminal Procedure, sec. 478.) The test by which to determine the sufficiency of an indictment is "whether enough remains after the rejection of all redundant matter to satisfy the requirement of the law." And the remedy of the accused is, in every such case, by plea, and not by motion to strike the unnecessary averments.

The attorney general has, it should be stated, expressed a doubt of the jurisdiction of the district court to commit plaintiff in error for non-payment of costs. The theory upon which the court acted in the imposition of that part of the penalty is not apparent from the record or briefs of counsel. We are satisfied, therefore, without pursuing the subject, to so modify the judgment as to award execution for taxable costs, in accordance with the statute above cited. The judgment as thus modified will be affirmed.

JUDGMENT ACCORDINGLY.

EMERY M. STENBERG ET AL. V. STATE OF NEBRASKA, EX
REL. CHARLES B. KELLER ET AL.

FILED JANUARY 7, 1897. No. 8281.

1. **Counties: PROPOSITION TO SELL PUBLIC GROUNDS: ELECTION.** The requirements of section 30, article 1, chapter 18, Compiled Statutes, in regard to the proportion of votes which must have been cast in favor of a proposition submitted at an election, to work its adoption, *held* applicable to the submission of a proposition to sell the public grounds of a county.
2. **Statutes: REPEAL: CONSTRUCTION.** It is a settled rule of construction in this state that a simultaneous repeal and re-enactment of a statute or section thereof, in terms or in substance, is a mere affirmation of the original and not a repeal thereof in the strict or constitutional sense of the word. *State v. Bemis*, 45 Neb., 724, followed.
3. ———: ———: ———. The act passed during the legislative session of 1887 entitled "An act to amend section 23 of an act entitled 'An act concerning counties and county officers,' approved March 1, A. D. 1879," did not repeal the succeeding section 24 of the act of 1879, as dependent upon section 23; neither did it repeal section 24 by implication. (Session Laws, 1887, p. 350, ch. 26.)
4. **Counties: PROPOSITION TO SELL PUBLIC GROUNDS: RESULT OF ELECTION: COUNTY BOARD.** The determination of whether or not the proposition to sell the public grounds of the county received the required number of votes to work its adoption, was not a matter for the official determination of the county board. The authority to make the sale depended upon it appearing from the abstract of the votes made during the official canvass of the returns of the election and filed with the county clerk that in favor of the proposition the requisite number of votes had been cast. As no official finding of the board which attempted the sale was necessary, the action of the county board which subsequently entertained and passed upon the claim of purchasers at the sale for repayment of the consideration, the claim being based on the void character of the sale for lack of authority in the commissioners to make it, did not involve a review or reversal of the finding of the former board.
5. ———: ———: ———: ———. The question of the title to the land attempted to be sold by the commissioners, and the validity of the conveyance or deed, were but incidental to the main one of the validity of the sale and must follow its decision, hence were not so involved in the consideration and adjudication of the claim before the commissioners as to present the question of their effect on the jurisdiction to hear and pass thereon.

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6. **Conveyance of Public Land: COLLATERAL ATTACK.** *Green v. Barker*, 47 Neb., 934, distinguished.
7. ———: **COUNTY BOARDS.** The conclusions announced in the former opinion, *Stenberg v. State*, 48 Neb., 299, including the adherence to the doctrine of *Douglas County v. Keller*, 43 Neb., 635, approved and reannounced, but need not be here restated.

REHEARING of case reported in 48 Neb., 299. *Reaffirmed.*

William D. Beckett and Read & Beckett, for plaintiffs in error.

Charles B. Keller and George W. Doane, contra.

HARRISON, J.

George W. Doane and Charles B. Keller filed a claim against the county of Douglas to recover a sum of money which they alleged they had paid the county in consideration of the sale to them of certain real estate by the county or its commissioners; alleging further that the attempted sale was of none effect, for lack of authority in the commissioners to make it, hence the vendees had received no consideration for the money paid and demanded its repayment. The claim was rejected by the county commissioners, from which action an appeal was duly perfected to the district court, where, as the result of issues joined and a trial thereof, the claimants were awarded judgment. The proceedings in the cause in the district court were reviewed in error proceedings in this court and the conclusions reached announced in an opinion written by POST, J., in *Douglas County v. Keller*, 43 Neb., 635, and in which opinion appears a statement of the facts deemed sufficient for a due understanding by the reader of the discussion therein made of the subject-matters involved. As a result of the hearing in this court the judgment of the trial court was affirmed, and after the mandate of this court had been forwarded and entered in the district court, an application to that court for the issuance of a peremptory *mandamus* ordering the

county board to take such action as would result in a warrant being drawn and issued in favor of the parties entitled thereto in lieu of and for the payment of the judgment and costs. The writ of *mandamus* was ordered to issue and the respondents in the action, the county commissioners of Douglas county, presented the case to this court for review, the result being an affirmance of the decision of the district court. The discussion of the questions presented and the decisions of them were embodied in an opinion prepared by NORVAL, J., in *Stenberg v. State*, 48 Neb., 299. A motion for rehearing on behalf of the unsuccessful parties was filed and sustained, and the case has been again argued and submitted. In the former opinion a statement of the facts was made, which for convenience of reference we will here reproduce:

"The county of Douglas, being the owner of 160 acres of land, which had been purchased and was used as a poor farm, its board of county commissioners adopted a resolution submitting to the voters of the county for their adoption or rejection the proposition to sell a part of the poor farm and with the proceeds build a county hospital. This question was voted upon at the general election held in said county November 2, 1886, and much less than one-half and but little over one-third of the total vote polled in said county at said election was cast in favor of said proposition, although it received more than two-thirds of all the votes cast on the question. In February, 1887, the east fifty acres of the poor-farm tract was subdivided into lots and blocks and platted as an addition to the city of Omaha. In the following April, Charles B. Keller and George W. Doane purchased from the county, at public auction, three of the lots for \$4,950. One-third of the purchase money was paid in cash, and for the balance they gave to the county their three promissory notes, aggregating \$3,300, and secured the same by mortgage upon the lots at the same time the county commissioners executed to the purchasers a warranty for said lots. Subsequently Keller and Doane paid two of the notes and

likewise paid the taxes upon the lots purchased by them, including taxes levied by the city of Omaha for street improvements. The other note remains wholly unpaid. In April, 1892, Keller and Doane filed with the county commissioners a verified itemized account or claim for the sums paid by them for said lots and for taxes, and demanded a return of the money thus paid, on the ground that the deed was void for lack of authority on the part of the commissioners to execute the same. The demand was refused, the claim was rejected and disallowed, and an appeal was prosecuted to the district court, where in May, 1893, the judgment in question was entered in favor of Keller and Doane. The latter has assigned his interest therein to the relator, the Merchants National Bank of Omaha. It is also shown by the record that there are available funds in the treasury of Douglas county sufficient to pay off and discharge said judgment."

Of the sections of the statute in force at the time in relation to the subject-matter of the sale of the public ground was one numbered 30, in relation to the submission of the proposition to sell to a vote of the electors of the county (see chapter 18, entitled "Counties and County Officers," Compiled Statutes, 1887), which reads as follows: "If it appears that two-thirds of the votes cast are in favor of the proposition, and the requirements of the law have been fully complied with, the same shall be entered at large by the county board upon the book containing the record of their proceedings, and they shall then have power to levy and collect the special tax in the same manner that the other county taxes are collected. Propositions thus acted upon cannot be rescinded by the county board." It is stated by counsel for plaintiffs in error that in the opinion in the case of *Douglas County v. Keller*, 43 Neb., 643, a doubt was expressed as to whether the section just quoted was applicable to an election on the subject of the sale of the public grounds. What was said in that opinion in regard to section 30 was as follows: "It is not clear from the language of the

sections which follow whether the provisions of section 30, requiring an affirmative vote of two-thirds of the electors voting at such election, applies to propositions for the sale of public property, or whether it relates exclusively to the authority for imposing such special taxes as are contemplated by law. But that question is not necessarily involved in this controversy, since it is not seriously contended that less than a majority of the voters could authorize the sale by the county of its public property." It will be noticed that it is stated that it "is not clear from the language of the section," etc., which is undoubtedly true, as the application of the section to an election on the question of the sale of the public land is far from being clearly apparent from the language employed. But what followed the statement in the opinion in regard to the doubt renders it clear that what was observed in reference to it was but a passing thought by the writer, made *arguendo*, and without further or other weight, as the applicability of the section was not involved or being considered.

Counsel have reviewed at some length the course of legislation on the subjects involved in portions of chapter 18, to which we have referred, prior to and resulting in the establishing in force the several sections on the subject of the submissions of various propositions by the county board to a vote of the electors, and urge that it becomes apparent that it is not only doubtful whether the provisions of section 30 apply to an election on the question of a sale of public grounds, but it is a verity that they do not. The precise question here mooted was under consideration by this court in the case of *State v. Anderson*, 26 Neb., 517, and it was announced: "The language of section 30 of part 1, chapter 18, of the Compiled Statutes, held to require a number of votes equal to two-thirds of all the votes cast upon any one question, or for all of the candidates for any one office voted for, or to be filled at the election at which is submitted a question of selling the public grounds or buildings of a county, to be

cast in favor of such proposition, in order to the adoption of such proposition." An examination of the legislation upon the subjects, and of the sections in force at the time of the transactions herein involved, leads us to the conclusion that the doctrine of *State v. Anderson* is correct, and it is therefore approved and followed.

It is contended for plaintiffs in error that, in the first enactments by the legislatures upon the subject of the sale of the public grounds of the county by the county commissioners, the requirement that, before any sale could be made, it should be authorized by a vote of the electors of the county, always appeared as a proviso in the section in which the powers generally of the commissioners were specified, which is true, and that in the laws passed in 1873 it appeared as an independent section, numbered 15 (it is now numbered 24); that although at all times since the change it has been numbered as a section of the statutes, it has retained its character of a proviso, a limitation of the grant made by the preceding section to which it refers and has referred in terms, and that a repeal of the section containing the grant would carry with it the proviso. It may be said that when the change was effected and the portion of the section which placed a limitation on the general grant was separated and numbered and made a distinct portion of the act, it lost, at least technically, if not in substance, its provisional character. It contained an allusion in direct terms to the sale mentioned in the preceding section, but was a separate part of the act. During the legislative session of 1887 section 23 of chapter 26, which contained the enumeration of the powers of the county commissioners, was passed, of which the portion we need notice was as follows: "The county boards of the several counties shall have power: * * * Third—To make all orders respecting the property of the county, to keep the county buildings insured, to sell the public grounds or buildings of the county and purchase other property in lieu thereof," etc., was the subject of amendment, and in

the amendatory act there appeared immediately after the word "thereof" the following: "*Provided*, That said county boards may, if they deem it for the best interests of the county to sell county property upon such terms of credit as shall by resolution of said county boards be determined upon; *Provided further*, That such deferred payments shall be for not more than two-thirds of the purchase price, the same to be secured by a note or notes, and a first mortgage upon the property so sold, said deferred payments to draw not less than six (6) per cent interest per annum from date until paid, said interest to be paid annually. Said county boards shall also have the power to sell or negotiate, without recourse upon the county, said notes and mortgage so by them taken; *Provided*, The same shall not be sold for less than par value including accrued interest." There being no other or further changing in the wording of the section of the statute, it being, except what we have last quoted, a re-enactment of the section. The title of the amendatory act (see Session Laws, 1887, ch. 26) was as follows: "An act to amend section twenty-three (23) of an act entitled 'An act concerning counties and county officers,' approved March 1, A. D. 1879." Section 2 thereof reads as follows: "All acts or parts of acts in conflict herewith are hereby repealed." The whole intent and purpose of the amendment of section 23 was to allow a sale to be made on credit. It was not the intention to in any manner or to any extent change the grant of power, either to enlarge or extend it, except in the particular just noted, but to continue the law in force as it was, to add to it no more than appeared in the proviso in regard to credit to be allowed purchasers. The amendatory act was otherwise but a literal re-enactment of the section, retaining its number and arrangement and number of subdivisions, in which were respectively stated the specific grants of powers, and was clearly intended to continue it in force uninterruptedly and was not in a strict or proper sense a repeal. (*State v. Wish*, 15 Neb., 448; *State v. Bemis*, 45

Neb., 724.) There was no inconsistency between the sections of the statute as amended and section 24, nor were they in any sense or degree repugnant or in conflict. Further, we think it clearly appears from a consideration of the scope and purpose of the amendment, the manner in which it was made, and the terms employed in the repealing clause of the amended section, that it was the evident intention of the legislators not to repeal section 24, but to retain it, and we are satisfied it was not repealed. The continued existence of section 24, while not of the questions presented, was, in the course of the decision, recognized in *State v. Anderson, supra*, and also in *Douglas County v. Keller, supra*, in which it was held: "The provision of section 24, chapter 18, Compiled Statutes, that county boards shall not sell the public grounds of any county without having first submitted the question to the electors thereof, is mandatory and an express limitation upon the powers of the several counties."

In the brief of counsel for plaintiff in error on motion for rehearing appeared the following statements of propositions which it was desired to urge; "The county board, as an administrative body, has no power to say that a deed of the county, valid upon its face, is void, and it has no power to audit a claim against the county based upon the alleged invalidity of such a deed prior to any adjudication that it is invalid." "The county board, as an administrative body, had no power to review and reverse the opinion and proceedings of a prior board in and about the sale of the lots in Douglas addition." In the brief on rehearing it was observed: "Stated generally, the only question in this case is, did the county board of 1892 have jurisdiction to hear and determine the issues involved in the controversy between Keller and Doane and the county of Douglas?" In argument, several points were discussed, all of them, however, connected with and bearing more or less directly upon the main issues. As we now view the matters in dispute, they all hinge upon the settlement of one or two main propositions, the most

important of which is whether the commissioners, when they attempted to make the sale of the public grounds, had authority or power so to do. In opening the discussion of this branch of the case we will first say that, as we gather the real substance of the cause of action, this being mooted to some extent in argument, it was to recover the money from the county, for the payment of which there was in fact no consideration, because for the sale of some property to the claimants there had existed no authority in the commissioners, hence the sale was void and of none effect. That an action at law may be maintained in a case of this nature, when the property sold and attempted to be conveyed was real estate, is sustained in *Clark v. Saline County*, 9 Neb., 516; *Argenti v. City of San Francisco*, 16 Cal., 282; *Pimental v. City of San Francisco*, 21 Cal., 362; *McCracken v. City of San Francisco*, 16 Cal., 620; *Grogan v. City of San Francisco*, 18 Cal., 590. The power of county commissioners generally to sell lands or public grounds of the county was conferred by the portions of section 23 of the statute hereinbefore quoted, but it was so limited and restricted in the succeeding section, 24, hereinbefore set out in terms, that it never could become operative or be exercised as to any of such property until the special authority was vested by a vote of the electors of the county. A submission of the proposition to such vote, the manner of submission, notice to be given, etc., are all provided in other sections to which we have alluded, also the requisite number of votes to carry it is prescribed, as we have seen in section 30, which we have discussed herein. There is another section of the statutes on the subject involved, which to our mind, in view of the conditions developed in the case at bar, must play quite an important part in its final adjudication, viz., section 29, which reads as follows: "At the time specified in such notice a vote of the qualified electors shall be taken in each precinct, at the place designated in such notice. The votes shall be received and returns thereof made, and the same shall be canvassed

by the same officers and in the same manner as required at each general election." It is a part of the duties in a canvass of the votes cast at an election that abstracts be made showing the number of votes and how cast, etc., which are preserved in the office of the county clerk. Such an abstract is an official showing of the facts required by law to be set forth therein, including the number of votes cast for or against any candidate for office or proposition before the voters at such election. That abstract of the canvass of the votes cast on the proposition submitted to the voters of Douglas county as to whether the county commissioners should be empowered to sell the lands of the county, out of the purported sale of which this controversy arose, furnished complete information, from which, when viewed in the light of section 30 of the law in which the proportion of the votes necessary to carry the proposition was specifically ascertained and stated, the fate of the proposition, and whether adopted or not, would appear with mathematical certainty, leaving nothing open for doubt, quibble, or investigation. The fact would there be shown,—would exist. It is clear that the statute did not contemplate an official finding or determination of the county board on the subject of whether the proposition had carried or not. No such task was required of them or committed to their consideration; their only duty was to enter the fact on their records which appeared from the official canvass. (See Compiled Statutes, 1887, ch. 18, sec. 30.) If they made an entry contrary to the reality as it appeared from the abstract of votes, it did not constitute an official finding or decision, and would not bind any one or confer any power on them to sell the land described in the proposition on which the electors voted. This must come to them from the actual existence of the fact that the requisite number of votes had been cast for the proposition, to carry it, as shown in the record of the votes. (*Diron County v. Field*, 111 U. S., 92; *Miller v. City of Amsterdam*, 43 N. E. Rep. [N. Y.], 632.) There was no official finding

or determination of the county board in respect to the votes polled and the result of the election, consequently the board which entertained jurisdiction and passed upon the claim of Keller and Doane was not, in so doing, called upon to review or reverse any decision of a former board. The want of authority or power of the commissioners arose from the lack of the requisite number of votes to work the adoption by the people of the proposition submitted, and this appeared from the abstract or record of the votes, and the attempt of the commissioners to make the sale was but an assumption of authority in the premises on their part and the acts performed in furtherance thereof were void, and no title to the property ever passed to the purchasers. That the supposed conveyance of the land was void and of none effect and that no title passed were but incidents of, and subsidiary to, the main issue, and when the sale was proved void for want of authority in the commissioners, and so adjudicated, the incidental matters fell with it; hence there was no governing questions or issues of the validity of the conveyance, or inquiry in regard to the title to real property which could militate against the jurisdiction of the board to pass upon the merits of the claim.

It is insisted that the doctrine announced by this court in the opinion in the case of *Green v. Barker*, 47 Neb., 934, wherein it was said: "Where property has been conveyed under the provisions of the act of congress of May 22, 1844, which may be termed the 'Townsite Act' (see 5 U. S. Statutes at Large, 657), by the United States to the corporate authorities of a town or city, or a trustee designated by law, a deed executed by the trustee or the party authorized by law to make the transfer, evidences the determination, by the party executing it, that all the preliminary steps have been taken and necessary requirements complied with, and that the person to whom the deed runs is the one entitled to receive it, and the question of the validity of the deed cannot be litigated in a collateral proceeding,"—is applicable and governing in

the case at bar, and, on the other hand, that the two cases are clearly distinguishable and unlike. We incline to the latter view. In the case of *Green v. Barker* there was in adjudication the right to make a collateral attack upon a deed duly executed by a party in whom the power to dispose of the land conveyed was fully vested by law, and in whom further rested the power to examine and determine the right of the party applicant for or demandant of a conveyance to the property, to so demand and receive the conveyance and title, to settle whether any such party had performed the acts or made the payments which by law constituted a consideration for the conveyance to him,—a question of whether there had been an irregular or mistaken exercise of a fully vested power or authority. In the case at bar it was not a query as to any irregularity or mistake in the exercise of an existing power, but the authority itself was denied; the power to act was controverted, which presented an issue for settlement entirely different from that raised by the facts in *Green v. Barker*, 47 Neb., 934.

We have now noticed and disposed of the main questions argued on the rehearing. There were some others, the disposition of which turn upon and must follow that of those directly settled; also some which were disposed of in the former opinion and with the discussion and settling of which at that time, on further examination, we are entirely satisfied, and will content ourselves at this time by signifying our approval. It follows that we adhere to the conclusions announced in the former opinion and that the judgment of the district court is

REAFFIRMED.

DOUGLAS COUNTY V. CHARLES B. KELLER ET AL.

FILED JANUARY 7, 1897. No. 8280.

Counties: VOID SALE OF LAND: PURCHASE MONEY. The settlement of the questions presented in this case is governed by the conclusions stated in the case of *Stenberg v. State*, 50 Neb., 127.

REHEARING of case reported in 48 Neb., 317. *Reaffirmed.*

William D. Beckett and *Read & Beckett*, for plaintiff in error.

Charles B. Keller and *George W. Doane*, *contra*.

HARRISON, J.

There was a judgment in the district court for claimants in this case, on an appeal from the action of the county board of Douglas county, on a claim of Charles B. Keller and others presented against the county, which, in error proceedings to this court, was affirmed. (See *Douglas County v. Keller*, 43 Neb., 635.) A motion was afterwards filed in behalf of the county to set the judgment aside, which, on hearing, was overruled. To review such ruling error was prosecuted for the county, and on presentation here the judgment of the lower court was affirmed (see *Douglas County v. Keller*, 48 Neb., 317), and on motion a rehearing was granted, pursuant to which, in the regular course, the case has been again submitted. As this case presents the same points for settlement as have been determined in the case of *Stenberg v. State*, 50 Neb., 127, following the conclusions therein, the judgment herein must be

REAFFIRMED.

ABRAHAM LAUDER V. STATE OF NEBRASKA.

FILED JANUARY 7, 1897. No. 8630.

1. **Criminal Law: INSTRUCTIONS: RECORD FOR REVIEW.** Error in the refusal to give a proffered instruction must affirmatively appear from an inspection of the entire record; and if a case is presented on a transcript unaccompanied by a bill of exceptions, and there may have been a possible state of the facts disclosed by the evidence which would have warranted such refusal, the assignment of error must be overruled.
2. **Motion for New Trial: JURISDICTION OF JUDGE.** A judge of the district court, within his own judicial district, has jurisdiction to and may hear and determine a motion for new trial in a case wherein the judge of another district presided during the trial, but, before the hearing of the motion for new trial, has ceased to preside.

ERROR to the district court for Douglas county. Tried below before NORRIS, J. *Affirmed.*

The opinion contains a statement of the facts.

Lec S. Estelle, for plaintiff in error:

The instruction requested by defendant below was erroneously refused. (*State v. Wilkins*, 28 Atl. Rep. [Vt.], 327; *Baccio v. People*, 41 N. Y., 265; *Higgins v. People*, 58 N. Y., 377.)

The motion for a new trial could not lawfully be heard before a judge other than the one who presided at the trial. (*Ohms v. State*, 5 N. W. Rep. [Wis.], 829; *Manhattan, A. & B. R. Co. v. Keeler*, 32 Kan., 163; *Bass v. Swingley*, 22 Pac. Rep. [Kan.], 716.)

A. S. Churchill, Attorney General, and *George A. Day*, Deputy Attorney General, for the state.

HARRISON, J.

July 12, 1895, an information was filed in the district court and by the county attorney of Douglas county, in which the plaintiff in error was charged with the crime

of assault with intent to commit rape. In the due course of the proceedings in the case he was arraigned, entered a plea of not guilty, was accorded a trial, as a result of which he was by the jury adjudged guilty, and, subsequent to the consideration and overruling of a motion for a new trial filed in his behalf, was sentenced to imprisonment in the penitentiary for a term of fifteen years.

One of the alleged errors assigned and urged in this court is that the trial court refused to give an instruction requested by plaintiff in error, in the following language: "You are instructed that you should take into consideration the delay of bringing prosecution, and the fact that Emma Anderson did not make complaint herself, or cause it to be done." The argument here is directed to the proposition that it was error to refuse to inform the jury that the delay in instituting the prosecution was an act for their consideration. The information, as we have before stated, was filed July 12, 1895, and the crime was alleged to have been committed September 15, 1894. Whether this instruction, viewed generally, was one proper to be given in criminal actions of the nature of the one at bar, we need not now determine. There might have existed a condition of the facts, as disclosed by the evidence, as applicable to which its giving would not have been proper, but there is no bill of exceptions in the record, hence the evidence is not before us; and if the instruction might have been correct and applicable to some state of the facts, we cannot say that there was not evidence which made the refusal to read it without error. If there was error in the denial of the request to give the instruction, it must affirmatively appear from the entire record. (*Willis v. State*, 27 Neb., 98; *Oltmanns v. Findlay*, 47 Neb., 289.)

Hon. W. F. Norris, judge of the eighth judicial district, presided at the trial of the case, acting for and as one of the judges of the fourth judicial district. The verdict of the jury was adverse to the plaintiff in error and a motion on his part for a new trial was duly filed. When

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this motion was called for hearing Judge Norris had ceased to preside over the court, and Judge C. R. Scott, of the fourth judicial district, was then on the bench, who heard the motion for a new trial and acted upon it, with the result we have hereinbefore stated. It is urged that it was error for Judge Scott to hear and dispose of the motion for new trial; that none other than the trial judge is competent to or can intelligently pass upon the questions raised by such motions. We will first notice the fact that no objection was made at the time to the hearing of the motion by Judge Scott, and there was no request or demand that Judge Norris be called upon to be present and hear the motion. From all that appears of record, the plaintiff in error was willing that the matter should be submitted to Judge Scott for his decision, and not having complained there, plaintiff in error should not be heard to object now. But, passing to the main question, Judge Scott was one of the judges of the fourth judicial district, wherein the case was tried and the motion was for hearing, and had jurisdiction, was fully authorized and empowered to hear and determine this or any matter then pending in the courts of the district, except such as he might be disqualified by law from hearing; and that he heard and ruled on the points raised by the motion for a new trial in the present case, in its then existing condition as disclosed by the record here, was not error. We acknowledge the full force of the arguments of counsel for plaintiff in error on this point, and have examined the decisions cited in support of the doctrine for which he contends, but the subject has heretofore been considered by this court and decided, no doubt, after due deliberation, and we now feel disposed to follow the rule then announced. In the decision of the case of *State v. Gaslin*, 32 Neb., 291, wherein the judge of the then eighth judicial district had, at the request of the judge of the tenth judicial district, presided during the trial of a cause in a county in the last mentioned district, and before the hearing of the motion for a new

trial had left the county and district, and the motion for a new trial was heard and decided by one of the judges of such district, the main facts and conditions being parallel with the circumstances existent in the case at bar, it was stated: "Where, after a verdict has been returned in the district court, the judge of another district, who tried the cause, ceased to preside and returns to his own district before the motion for a new trial is heard and determined, the motion may be passed upon by the court where the case is pending where the judge of the district is sitting." (See, also, *Chicago, P. & S. R. Co. v. Town of Marseilles*, 107 Ill., 315; *Manufacturers Mutual Fire Ins. Co. v. Daboll*, 44 N. W. Rep. [Mich.], 604; *Malone v. Eastin*, 2 Port. [Ala.], 182.)

There are no other alleged errors presented, and it follows from the conclusions announced that the judgment of the district court will be

AFFIRMED.

CHICAGO LUMBER COMPANY V. JOHN S. BENJAMIN.

FILED JANUARY 7, 1897. No. 6982.

1. **Review:** UNAUTHENTICATED BILL OF EXCEPTIONS. A bill of exceptions which is not authenticated by the certificate of the clerk of the trial court is not entitled to consideration in this court.
2. ———: ———. Where to an examination and settlement of questions argued to this court an inspection of the evidence contained in a bill of exceptions is necessary, and such bill lacks the authentication of the clerk of the trial court, the points presented may be overruled.

ERROR from the district court of Custer county. Tried below before HOLCOMB, J. *Affirmed*.

H. W. Dickinson, Dickinson & Shinn, and Wolfenbarger & Williams, for plaintiff in error.

Campbell & Ludwig, contra.

HARRISON, J.

This case is presented to this court by petition in error to secure a review of the proceedings during its trial in the district court of Custer county, and the errors assigned and argued relate to the sufficiency of the evidence adduced to sustain the verdict rendered, and some other questions, all and singular of which require a reference to the evidence for their examination and settlement. There is attached to the record what purports to be a bill of exceptions, but it is not authenticated as such instrument by the certificate of the clerk of the trial court. This being true, the evidence is not properly before us for inspection, and as the points of complaint which are argued cannot be considered without it, they must be overruled. The judgment of the district court is

AFFIRMED.

GEORGE W. SCOTT, APPELLEE, V. EDWIN R. OVERALL,
APPELLANT, ET AL.

FILED JANUARY 7, 1897. No. 6869.

Bill of Exceptions: AUTHENTICATION BY CLERK. The statute by which the clerk of the district court is allowed to settle and sign a bill of exceptions, instead of the judge who heard or tried the cause in which it is sought to make such bill a part of the record, must be strictly construed, and the methods prescribed by statute, if any, for making the facts on which the clerk's authority to settle and sign a bill of exceptions apparent of record, should be followed; and where the statute requires a showing of the facts to be by affidavit, a statement by the clerk, in the certificate, that he has personal knowledge of the facts, will not be sufficient to take the place of the required affidavit.

APPEAL from the district court of Douglas county.
Heard below before WALTON, J. *Affirmed.*

David Van Etten, for appellant.

Curtis & Shields, contra.

HARRISON, J.

The subjects argued on error in this case to this court are such as arise out of facts and circumstances presented in form of evidence to the attention of the trial court, and which, to entitle them to consideration here, must have been preserved in a bill of exceptions. Section 311 of the Code of Civil Procedure, which is in relation to bills of exceptions, provides that a bill of exceptions shall be settled and signed by the judge who heard or tried the cause in the record of which it is sought to incorporate such document; and further: "In case of the death of the judge, or when it is shown by affidavit that the judge is prevented by sickness or absence from his district, as well as in cases where the parties interested shall agree upon the bill of exceptions, and shall have attached a written stipulation to that effect to the bill, it shall be the duty of the clerk to settle and sign the bill in the same manner as the judge is by this act required to do." The instrument which is designated as the bill of exceptions in the record in the case at bar was signed by the clerk of the trial court, his authority for so doing being derived, it is claimed, from the fact of the absence from the district at the time of the trial judge. But the prescribed statutory method of making such fact a matter of record, *i. e.*, by affidavit, was not pursued. The party who desired the settlement of the bill apparently contented himself with a statement by the clerk of the district court, in the certificate attached to the instrument, of his personal knowledge in regard to the absence of the judge from the district, for the record contains no other showing of any statutory grounds for the clerk's acting in the matter, instead of the judge, than the statement we have just indicated. This was not sufficient. Statutes which allow the clerk or persons other than the trial judge to settle and sign bills of exceptions are strictly construed, and one of the statutory reasons must exist and it must be shown of record in the manner pre-

scribed, if any. (3 Ency. of Pleading & Practice, p. 453; *Schaffroneck v. Martin*, 9 Neb., 38.) This being true, there is no bill of exceptions in this case, and the points presented cannot be determined without a reference to the evidence, properly preserved in a bill. It follows that they are unavailing and the judgment of the district court must be

AFFIRMED.

RICHARD H. BELLAMY V. JONAS E. CHAMBERS.

FILED JANUARY 7, 1897. No. 6932.

1. **Issues in Appellate Court.** "In an appeal from the county court to the district court, the cause must be tried on the same issues as were tried in the county court, unless some new matter has arisen since the trial there, such as payment, etc." (*Halbert v. Rosenbalm*, 49 Neb., 498.)
2. **Covenant Against Incumbrances: LIMITATION OF ACTIONS.** A covenant against incumbrances in a conveyance of land is, in effect, that the premises then are free from incumbrances; and if any incumbrances exist, the covenant is broken and a cause of action therefor accrues in favor of the covenantee, which will be barred by limitation in five years.

ERROR from the district court of Gosper county. Tried below before WELTY, J. *Affirmed.*

W. S. Morlan, for plaintiff in error.

W. B. Miller, *contra.*

HARRISON, J.

On July 10, 1893, the plaintiff commenced this action in the county court of Gosper county to recover the sum of \$29.91 and interest as prayed for in his bill of particulars. The cause of action was based upon a breach of covenant against incumbrances contained in a deed of a certain described tract of land, executed and delivered

by defendant to plaintiff, of date December 16, 1886, wherein there appeared a covenant by which it was warranted that, except a mortgage lien specifically stated, the premises conveyed were "free from incumbrance," etc. The breach was stated in the bill of particulars as follows: "Said premises were not free from incumbrance at the time of the execution of said deed, but were incumbered by the taxes which had been lawfully assessed against them for the year 1886, to the amount of \$20 and accrued interest. The plaintiff was compelled to remove said incumbrance, and paid \$29.91 to remove the same, of all which the defendant had due notice. Said sum was paid June 27, 1890." A trial in the county court resulted in a judgment favorable to defendant, from which an appeal to the district court was perfected on behalf of plaintiff. In the petition filed in the appellate court there appeared the following:

"The taxes assessed and levied against said land for the year 1886, amounting to the sum of \$20, had not been paid, and at the time of said conveyance were a lien and incumbrance on said tract of land, and after the same became due, to-wit, about the 1st day of May, 1887, the plaintiff requested the defendant to pay the same and comply with the terms of covenants and warranty in said deed first mentioned; thereupon the defendant then requested the plaintiff to pay said taxes to the treasurer of Gosper county, Nebraska, and promised to repay the amount so to be advanced by this plaintiff necessary to pay said taxes and remove said incumbrance.

"4. In compliance with the said request of the defendant, and relying on the said promises of the said defendant, and for the purpose of preventing the said land from being conveyed by tax deed, this plaintiff, on the 27th day of June, 1890, paid to the treasurer of Gosper county, Nebraska, the delinquent taxes on the above described tract for the year 1886, which, with accrued interest, at that time amounted to the sum of \$29.91, said amount then being the amount necessary to pay in order to dis-

charge said tract of land from the incumbrance thereon by reason of said taxes.

"5. No part of the said sum of money has been repaid by the defendant, and there is now due from the defendant to the plaintiff, for said taxes so paid, the sum of \$29.91, with interest from the 27th day of June, 1890."

For the defendant there was presented the following motion: "Comes now the defendant in the above entitled cause, and moves the court for a rule on the plaintiff that he be made to strike out from his petition in this court, filed December 8, 1893, all that portion of allegation number three (3) commencing 'The plaintiff requested the defendant to pay the same and comply with the terms of covenants and warranty in said deed first mentioned; thereupon the defendant then requested the plaintiff to pay said taxes to the treasurer of Gosper county, Nebraska, and promised to repay the amount so to be advanced by this plaintiff necessary to pay said taxes and remove said incumbrance;' also to strike out therefrom all of allegation No. 4, reading as follows: 'In compliance with said request of the defendant, and relying on the said promises of said defendant;' and also that part of allegation No. 5, as follows, reading 'No part of the said sum of money has been repaid by the defendant,' for the reason that the issues in the court below, where this cause was tried, and from which it was appealed, did not include the matter set up in said petition, nor was the trial upon the said matter so set out, and the issues involved in said petition would not be the issues in the lower court, and the retaining of said matter would cause the raising of an entirely new issue in the case." This motion was sustained, and there was then filed a demurrer to the petition, which was also sustained, and the plaintiff having signified his intention to plead no further, his action was dismissed.

It is urged in this court, in error proceedings, that the district court erred in sustaining the motion for such action and striking out the portions of the petition. If

the matter which in effect was destroyed, or rendered of no avail by its removal from the petition, be viewed as an allegation of the right of action on the promise of defendant to reimburse the plaintiff for the payment of taxes assessed against the land prior to its conveyance, it was a change, or direct departure, from the cause of action, the breach of the covenant against incumbrances declared upon in the bill of particulars in the county court, in no sense identical therewith, and it was, therefore, proper to strike it out of the petition. (*Bishop v. Stevens*, 31 Neb., 786; *Halbert v. Rosenbalm*, 49 Neb., 498.) Conceding that it might be a promise to pay the debt, which had, at the time of the beginning of this action, become barred by the running of the statute of limitations, it could have been of no avail, because then, as to both the original cause of action and the subsequent promise relied upon, the statute had run. Viewed as an action predicated upon the covenant against incumbrances, the demurrer was well taken and the decision sustaining it was not erroneous. The defendant, the vendor of the land, was, on December 16, 1886, the date of his conveyance to the plaintiff, liable for the taxes assessed against the land for that year. (Compiled Statutes, 1895, ch. 77, sec. 44; *Campbell v. McClure*, 45 Neb., 609. See, also, *McClure v. Campbell*, 25 Neb., 57.) The taxes constituted a lien on the land. (Compiled Statutes, 1895, ch. 77, art. 1, sec. 138; *McClure v. Campbell*, *supra*.) In the decision of the case of *Chapman v. Kimball*, 7 Neb., 399, an action to recover the amount of taxes a lien on lands at the time of conveyance with covenant against incumbrances, it was said in the third paragraph of the syllabus: "A covenant against incumbrances is a present engagement that the grantor has an unincumbered title, and is not in the nature of a covenant of indemnity. The statute of limitations, therefore, commences to run at once if an incumbrance existed at the time of the conveyance." And in the body of the opinion it was stated: "The covenant against incumbrances is in the present

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tense, 'that said premises are free from incumbrance.' If the taxes in question actually existed as a lien against the land in question at the time of the conveyance, the covenant was broken at that time and a cause of action at once accrued in favor of the covenantee for his damages." (*Davidson v. Cox*, 10 Neb., 150; *Kern v. Klocke*, 21 Neb., 529; *Cheney v. Straube*, 35 Neb., 524.) Section 10 of the Code of Civil Procedure, in reference to time in which actions can be brought, is as follows: "Within five years, an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment." In *Kern v. Klocke*, *supra*, it was held: "An action for damages for the breach of the covenants of warranty contained in a deed conveying land is an action upon a specialty within the meaning of the tenth section of the Code of Civil Procedure, and may be brought at any time within five years after the cause of action shall have accrued." It follows from the views hereinbefore expressed that the judgment of the district court was right and will be

AFFIRMED.

EMIL HANS V. STATE OF NEBRASKA.

FILED JANUARY 7, 1897. No. 8463.

1. Review: CONTINUANCE. Affidavits for a continuance must be embodied in a bill of exceptions to be considered in the appellate court.
2. Criminal Law: CONTINUANCE: ABSENT WITNESS. Whether the prosecution in a criminal case may avoid a continuance sought by the defendant on a showing which entitles him to a postponement of the trial on the ground of an absent witness, by the state admitting merely that the witness, if present, would testify as represented in the application, is not involved in this case, and consequently not decided.
3. ———: ELECTION AS TO COUNTS: REVIEW. The ruling of the court, made before the trial commenced, denying the defendant's motion to require the state to elect under which count or counts of an in-

formation it would rely for conviction is reviewable without being assigned as error in the motion for a new trial.

4. **Intoxicating Liquors: UNLAWFUL SALE: INFORMATION: JOINDER OF COUNTS.** A count charging the illegal sale of intoxicating liquors may be joined in an information containing a count charging the defendant with keeping such liquors for sale in violation of law.
5. **Criminal Law: WITHDRAWAL OF REST: REVIEW.** An order in a criminal case permitting the state to withdraw its rest, for the purpose of introducing further testimony, will not be disturbed where an abuse of discretion on the part of the trial court has not been shown.
6. ———: **BILL OF EXCEPTIONS: OMISSION OF EVIDENCE: REVIEW.** Where the bill of exceptions reveals that material evidence introduced on the trial has been omitted, this court cannot review an order denying a motion to direct a verdict, when to do so would require an examination of the proofs.
7. ———: **MISDEMEANOR: DATE: PROOF.** In a prosecution for a misdemeanor it is not essential that the state should prove the commission of the offense on the precise date laid in the information. It is sufficient if it be established that the crime was committed within the statute of limitations.
8. **Intoxicating Liquors: UNLAWFUL INTENT: PROOF.** The unlawful intent with which intoxicating liquors are kept may be presumed by the recent prior sale by the defendant of the same kind of liquors, in violation of law.
9. ———: **UNLAWFUL SALE: INSTRUCTIONS.** *Held*, That the first instruction did not assume the possible existence of a single fact, but merely told the jury what were the material averments of the information.
10. **Instructions: CONSTRUCTION.** A charge which, construed as a whole, plainly states the law applicable to the case is without error.
11. **Assignments of Error.** An assignment in a petition in error that the court erred in denying the motion for a new trial is too indefinite to be available where several distinct grounds are stated in the motion.
12. **Intoxicating Liquors: SALE WITHOUT LICENSE.** Each act of keeping for the purpose of sale, without a license or permit issued by the proper body, any malt, spirituous, or vinous liquors in this state constitutes a misdemeanor.
13. ———: ———: **SENTENCE.** Where an information contains two counts, each charging the keeping for sale, in violation of law, of a different kind of intoxicating liquors, and defendant is found guilty on both counts, a separate sentence is to be imposed for each conviction.

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14. ———: ———: STATUTES. *In re White*, 33 Neb., 812, followed upon the question of the constitutionality of chapter 33, Session Laws of 1889.

ERROR to the district court for Stanton county. Tried below before NORRIS, J. *Affirmed*.

The facts are stated in the opinion.

C. C. McNish, for plaintiff in error:

The overruling of accused's motion for a continuance upon condition that the prosecuting attorney would admit the witnesses would testify to facts set forth in the affidavit accompanying the motion, was erroneous. (*Newman v. State*, 22 Neb., 248; *State v. Warden*, 8 S. W. Rep. [Mo.], 233; *State v. Berkley*, 4 S. W. Rep. [Mo.], 24; *State v. Jennings*, 81 Mo., 193; *State v. Neider*, 6 S. W. Rep. [Mo.], 708; *State v. Dyke*, 9 S. W. Rep. [Mo.], 925; *People v. Vermilyea*, 7 Cow. [N. Y.], 369; *Dominges v. State*, 7 S. & M. [Miss.], 475; *State v. Dawson*, 1 S. W. Rep. [Mo.], 827; *Carter v. State*, 35 S. W. Rep. [Tex.], 378; *Clark v. State*, 33 S. W. Rep. [Tex.], 224; *Texas & P. R. Co. v. Yates*, 33 S. W. Rep. [Tex.], 291; *Miller v. State*, 29 Neb., 437; *Goodman v. State*, 1 Meigs [Tenn.], 195; *Brill v. Lord*, 14 Johns. [N. Y.], 341; *Hardesty v. Commonwealth*, 11 S. W. Rep. [Ky.], 589; *Pace v. Commonwealth*, 12 S. W. Rep. [Ky.], 271; *Gandy v. State*, 28 Neb., 707; *Hair v. State*, 14 Neb., 503; *Wassells v. State*, 26 Ind., 30; *Carmon v. State*, 18 Ind., 450; *Page v. Arvin*, 29 Tex., 54; *Baker v. State*, 58 Ark., 513; *Pannell v. State*, 29 Ga., 681; *McLaughlin v. State*, 8 Ind., 281; *People v. Diaz*, 6 Cal., 248; *People v. Brown*, 54 Cal., 243; *State v. Salge*, 2 Nev., 321; *Nave v. Horton*, 9 Ind., 563; *Skaro v. State*, 43 Tex., 88; *De Warren v. State*, 29 Tex., 464; *Hyde v. State*, 16 Tex., 445; *Trulock v. State*, 1 Ia., 519.)

The court erred in overruling the motion to require the state to elect as to the counts upon which it would proceed to trial. (*Burrell v. State*, 25 Neb., 581; *Martin v. State*, 30 Neb., 421; *State v. Valentine*, 63 N. W. Rep. [S. Dak.],

541; *People v. Rice*, 61 N. W. Rep. [Mich.], 540; *People v. Aiken*, 33 N. W. Rep. [Mich.], 821; *Menken v. City of Atlanta*, 2 S. E. Rep. [Ga.], 559; *Griffin v. City of Atlanta*, 4 S. E. Rep. [Ga.], 154; *State v. Harris*, 20 N. W. Rep. [Ia.], 439; *People v. Rohrer*, 58 N. W. Rep. [Mich.], 661.)

The court erred in imposing a double fine. (*State v. Lancaster County*, 6 Neb., 474; *City of Tecumseh v. Phillips*, 5 Neb., 305; *Ives v. Norris*, 13 Neb., 252; *Miller v. Hurford*, 11 Neb., 377.)

A. S. Churchill, Attorney General, and George A. Day, Deputy Attorney General, for the state:

There was no error in the order overruling the motion for a continuance. (*State v. Hatfield*, 72 Mo., 518; *State v. Mooney*, 10 Ia., 506; *People v. Brown*, 59 Cal., 345; *Burrell v. State*, 25 Neb., 581.)

Other cases cited: *Hornberger v. State*, 47 Neb., 40; *Rauschkolb v. State*, 46 Neb., 658.

NORVAL, J.

John A. Ehrhardt, the county attorney of Stanton county, filed an information in the district court of that county containing seventeen counts, the first fifteen of which charged Emil Hans with the unlawful selling of intoxicating liquors to different persons at various dates, and the remaining two counts charged him with keeping intoxicating liquors for the purpose of sale in violation of law. The accused, upon the trial, was found guilty as charged in the last two counts of the information, and acquitted on the other counts. A motion for a new trial was overruled, and the court sentenced the defendant to pay a fine of \$100 on each of the two counts of the information under which he was found guilty.

The first matter of which complaint is made is the overruling of the defendant's motion for a continuance. A reversal cannot be had on this ground, for the reason it does not appear that the defendant was prejudiced by the ruling, or that there was any merit in his application.

The motion states no reason for the postponement of the trial over the term, but purports to have been based upon an affidavit of some person not named in the application, and no such affidavit has been incorporated in the bill of exceptions. There is contained in the transcript what purports to be the copy of an affidavit made by the defendant which, judging from its scope, is possibly the one referred to in the motion. But whether or not it was used on the hearing, the record is wholly silent. Not having been embodied in the bill of exceptions, the affidavit is not entitled to consideration. (*Strunk v. State*, 31 Neb., 119; *Vallindingham v. Scott*, 30 Neb., 187; *Olds Wagon Co. v. Benedict*, 25 Neb., 372; *Van Eitten v. Kisters*, 31 Neb., 285.)

The attorney general argues that, should the affidavit referred to be considered, and it was sufficient to support the application, there was no error in refusing the continuance, because the record shows that the county attorney, in open court, admitted that the witnesses named in the affidavit, if present, would testify to the facts therein set forth, and that such facts could be read to the jury as evidence, and that thereupon the ruling assailed was made. Counsel for the accused strenuously insist that the admissions of the prosecutor just mentioned were insufficient to prevent a postponement of the trial or to cure the error in denying the application therefor. This court has held in a civil case (*Burris v. Court*, 48 Neb., 179) that it is not reversible error to deny an application for a continuance based upon allegations of the absence of a witness from the state, and of the facts to which he is expected to testify, when the party resisting such application admits that the testimony of the witness would be as represented and may be so treated on the trial. Whether the same rule obtains in criminal prosecutions this court has not hitherto offered an opinion, and it will not do so now, owing to the fact that the question is not sufficiently presented by the record. It may be noted in passing that the courts

of the sister states are divided in their holding upon the proposition. (See authorities cited in the briefs filed herein, also 4 Ency. Pl. & Pr., p. 865.)

Objection is taken to the overruling of the defendant's motion made prior to the commencement of the trial, to require the state to elect whether it would proceed to trial upon the first fifteen counts of the information or the last two counts thereof. The answer of the state to this is that the ruling cannot be considered because not raised in a motion for a new trial. In the last contention we do not concur. The purpose of a motion for a new trial is to challenge the attention of the trial court to its rulings made during the trial proper,—that is, from the beginning of the impaneling of the jury until the return of the verdict,—in order that any errors therein may be speedily corrected before the case has passed beyond its control. Decisions not made during the trial, to which class the one under consideration belongs, are available on review, although not mentioned in a motion for a new trial, because they are not grounds for which a new trial can be moved. In *Bohanan v. State*, 15 Neb., 209, it was asserted that the ruling on a plea in abatement could be reviewed without having been assigned as error in the motion for a new trial. (See *O'Donohue v. Hendrix*, 13 Neb., 255; *Graves v. Scoville*, 17 Neb., 593.) In *Ford v. State*, 46 Neb., 390, it was ruled that alleged errors in overruling challenges to jurors are not available when not called to the attention of the trial court in the motion for a new trial, since such rulings occurred during the trial.

As already stated, the last two counts charged the defendant with the unlawful keeping of intoxicating liquors for sale, while the other counts charged the illegal sale of liquors. Separate and distinct crimes, it must be conceded, are joined in the information. The rule in regard to joinder of counts in cases of misdemeanors is that several distinct offenses of the same kind may be united in that manner in the same information. As stated by

Mr. Black in his valuable treatise on Intoxicating Liquors, section 387: "To sell liquor unlawfully and to keep it for sale unlawfully are entirely distinct offenses under these statutes, founded on distinct criminal purposes, and completed by different criminal acts. Hence it follows that although the offender will be liable to prosecution under a statute for the unlawful selling of liquors when the sale is consummated, this will not hinder his being punished for the unlawful keeping of liquors before the sale. For the same reason, a conviction or acquittal for one of these offenses is no bar to the prosecution for the other, and the evidence of a sale admitted on the trial for the selling is admissible on a subsequent trial for the unlawful keeping." It does not follow, because more than one crime is charged, that the state was required to make an election of the counts of the information under which it would proceed to trial and rely for conviction. The selling of liquors without license and the keeping them for illegal sale, it is true, are separate and distinct offenses, but they are all of the same grade and belong to the same general group or class of crimes, therefore they are properly joined in separate counts of the same information. (*Burrell v. State*, 25 Neb., 581; *Martin v. State*, 30 Neb., 507; *Nichols v. State*, 49 Neb., 777; Black, Intoxicating Liquors, sec. 442; *State v. Klein*, 78 Mo., 627; *Tillery v. State*, 10 Lea [Tenn.], 35; *People v. Charbineau*, 115 N. Y., 433; *Commonwealth v. Gillon*, 84 Mass., 505; *Walters v. State*, 5 Ia., 507; *Commonwealth v. Moorhouse*, 67 Mass., 470.) In *Burrell v. State*, 25 Neb., 581, it is ruled that counts for selling intoxicating liquors on Sunday may be joined in an indictment containing a charge against the same person with selling such liquors to a minor; thus permitting the uniting in the same indictment or information of separate and distinct offenses belonging to the same class, although differing in degrees of punishment. In *Commonwealth v. Clark*, 80 Mass., 367, it was asserted that counts for the manufacturing for sale, for being a common seller, and

for a single sale of intoxicating liquors, in violation of statute could be properly joined in the same indictment. In *State v. McLaughlin*, 27 Pac. Rep. [Kan.], 840, it was held that a count for maintaining a nuisance under section 13 of the prohibitory law of Kansas was properly united in an information with other counts charging illegal sales of intoxicating liquors under another section of the same law. No good reason has been suggested why the several counts should not have been united in this information, and there is sufficient cause for their joinder. While the offense for selling intoxicating liquors without a license is separate and distinct from that of keeping such liquors for illegal sale, each belongs to the same class of crimes. The offenses are of a kindred nature, and whether tried jointly or separately, as was well said by the supreme court of Kansas, they "must be tried in the same way, and largely upon the same evidence." It was stated in *Hornberger v. State*, 47 Neb., 40: "The unlawful intent with which the liquors were kept may be presumed from the fact of their sale in violation of law. When under an information for keeping intoxicating liquors for sale, a sale is proved, the burden is upon the accused to show that he held a license or permit from the proper authorities." We are persuaded that no error was committed in overruling the defendant's motion to elect.

Upon the state resting its case, the defendant requested the court to direct a verdict for the accused under the sixteenth and seventeenth counts of the information, whereupon the county attorney asked, and was given, leave, over objection of defendant, to withdraw the rest for the purpose of introducing further testimony, which request was granted, and additional testimony was received on behalf of the prosecution. Complaint is made of this action of the trial court, but as no abuse of discretion is shown, this court will not interfere. (*Seiber v. Weiden*, 17 Neb., 582; *Gillette v. Morrison*, 9 Neb., 395; *Tomer v. Densmore*, 8 Neb., 384; *Chicago, B. & Q. R. Co. v.*

Goracke, 32 Neb., 90; *Pence v. Uhl*, 11 Neb., 320; *Yeoman v. State*, 21 Neb., 171.)

Error is predicated upon the refusal of the court, after the state had rested its case the second time, to direct the jury to return a verdict of not guilty as to the last two counts of the information. This point is not properly saved by the record for review. It is disclosed on page 97 of the bill of exceptions that the state, in making out its case in chief, introduced in evidence the half barrel of "Raspberry Cordial" and two cases of "Eggine" identified and referred to by the witnesses as having been found secreted on defendant's premises, and that two samples of the last named liquid were marked by the official reporter for identification as exhibits "B" and "C," respectively, and that he likewise marked a sample of the "Raspberry Cordial" exhibit "D." It is also recited that those exhibits are made part of the bill of exceptions; but we are unable to discover as part of the record either the half barrel of "Cordial" or "Eggine" introduced in evidence, much less samples of either of them. The bill of exceptions contains internal evidence that it does not contain all the evidence which was before the court and jury when the request to direct a verdict of acquittal was made; hence this court is unable to determine whether the ruling assailed was right or wrong. The presumption must be indulged, in the absence of part of the testimony—the liquors in question, that the decision was right. One of the controverted questions of fact on the trial was whether the liquors were intoxicating, and samples thereof not having been preserved by the bill of exceptions, we have not the means afforded the trial court and jury, of determining the intoxicating character of the "Cordial" and "Eggine," and the assignment of error under consideration is accordingly overruled. (*Missouri P. R. Co. v. Hays*, 15 Neb., 224; *Nelson v. Jenkins*, 42 Neb., 133; *Warner v. Hutchins*, 48 Neb., 672.)

The ruling of the court is criticised which denied de-

defendant's motion to strike out the testimony of Solomon Denny as to the sale of the liquor made to him by the defendant on the 5th of November, 1894. The ground of this complaint is that the accused was not charged with selling, or keeping for sale, any intoxicating liquors on that date. This is true, but that did not render the testimony incompetent. The state was not confined in its proof to the particular dates alleged in the information. It is sufficient if the proof tended to establish the commission of the offense within the period limited by statute for the prosecution thereof. (*Yeoman v. State*, 21 Neb., 171; *Palin v. State*, 38 Neb., 862.) This doctrine does not conflict with *State v. Pischel*, 16 Neb., 490, cited by counsel for the accused, since in that case it was merely decided that each act of selling any of the liquors named in the statute constituted an offense, and that an indictment was therefore had which charged the sale of all the liquors mentioned in the law on a particular day with a *continuando*. The counts of the information under which the convictions in the case at bar were had fix the date of the commission of the offenses on November 17, 1894, just twelve days subsequent to the illegal sale of liquor to Denny. Such a sale was pertinent and proper to establish the unlawful purpose of the defendant in keeping the liquors found in his possession. (*Hornberger v. State*, 47 Neb., 40.)

The seventh and ninth assignments of error will be considered together, as they present the same question for review. The state was permitted to prove on the trial by W. L. Bowman and S. Persons the per cent of alcohol contained in the "Raspberry Cordial," also in the "Eggine," or "Tom and Jerry," as called by some of the witnesses. Several objections were made by the defendant's counsel to those witnesses answering the interrogatories of the state put to each of them for the purpose of eliciting testimony upon the line just indicated, but the only objection upon which reliance is now placed is that no proper foundation was laid for the introduction of the

testimony. It is obvious the purpose of the prosecutor was to establish that the liquors were intoxicating, which was a material issue in the case. Proofs having been introduced tending to show that said "Raspberry Cordial" and "Eggine" were found in the defendant's possession near the date mentioned in the information, and that he had previously sold the same kinds of liquors, it was then competent to show the intoxicating character of those in controversy. What was intended by the objection, doubtless, was that the witnesses had not shown themselves competent to testify upon the matter which the question put to them was sought to elicit, and, so regarding the scope and purpose of the objection, we think it was well taken, as the record had not at that time disclosed either witness was able to tell whether this "Raspberry Cordial" or "Eggine" contained alcohol, or was intoxicating or not. This omission was, however, supplied by the subsequent testimony of the same witnesses, although while both were physicians of long standing, it was not disclosed that either was a proficient judge of intoxicating liquors, yet sufficient knowledge of the subject was possessed to make the testimony of each competent. The weight to be accorded the same was solely for the jury to determine. Furthermore, after the objection alluded to was interposed, each witness unchallenged testified to the per cent of alcohol in the said samples submitted to him, besides the defendant's counsel also fully elicited the same evidence from each of them, so that any error committed in the ruling upon said objection was without prejudice.

Complaint is made of the first instruction, which reads as follows:

"1. The defendant, Emil Hans, is charged in the information with selling intoxicating liquors, at various times, to different individuals, as set forth in the information, without having obtained a license to sell such liquor, as provided by law. Defendant is also charged with keeping for sale on the 17th day of November, 1894,

vinous liquors, consisting of one half barrel of 'Raspberry Wine,' and spirituous liquors, consisting of two cases of prepared 'Tom and Jerry,' without having procured a license for the sale thereof in compliance with the laws of this state."

A single vice is imputed to the foregoing, which is that it assumes that the "Raspberry Wine" was vinous liquor and that "Tom and Jerry" was a spirituous liquor, and that it was necessary for the defendant to have a license to sell the same to entitle him to keep the same in his possession. This criticism is unjust. The court assumed the existence of no fact, but merely stated the nature of the offenses charged in substantially the language of the information.

Another assignment is that the court erred in giving the third paragraph of the charge. That instruction related alone to the offenses set forth in the first fifteen counts of the information, and informed the jury what was necessary for the state to establish before a conviction could be had thereunder. Since the defendant was acquitted under all of said counts, it is useless to examine the instruction, inasmuch as the defendant was not prejudiced by its giving.

It is next objected that the court erred in giving this instruction:

"4. The statutes of this state make it unlawful for any person to keep for the purpose of sale without license any malt, spirituous or vinous liquors in this state, and the possession of any such liquor is made presumptive evidence of the violation of the law, unless, after examination, he shall satisfactorily account for and explain the possession thereof, and that it was not kept for any unlawful purpose."

The foregoing is substantially in the language of a portion of section 20, chapter 50, Compiled Statutes, entitled "Liquors." It is argued that the presumption of a violation of said law arises from the possession of such liquors only when they have been seized under

a search warrant contemplated by the statute, and the person therein named has been taken before a magistrate for examination. For the purposes of the case at bar, the soundness of said contention may be conceded, and yet the instruction was not erroneous, because it was developed on the trial that the liquors were actually seized by the sheriff, on a warrant issued by the county judge, and that the defendant was taken before him for examination. So that upon the defendant's own construction of the statute, irrespective of what may be the true interpretation, the instruction was faultless.

The fifth instruction is assailed on the ground that it permitted the jury to find the defendant guilty of both the sixteenth and seventeenth counts, even though the evidence should disclose that he was only guilty of the offense charged in one of them. The instruction, when considered in connection with the one following it, is not susceptible of the construction placed thereon by counsel. The jury were directed by the sixth instruction to consider each count of the information and ascertain and decide from the evidence whether the defendant was guilty or not guilty of any one of the offenses charged. It is a familiar rule that instructions must be construed together.

The observations made on the criticisms urged against the third instruction are equally applicable to the assignment of error based upon the giving of the seventh instruction, and such assignment is overruled without further consideration. The charge, construed as a whole, plainly stated the law applicable to the case, and was not prejudicial to the accused.

A reversal is asked for the refusal of the court to give the following request of the defendant:

"5. You are instructed that the state must prove that on the 17th day of November, 1894, the defendant had in his possession the 'Raspberry Wine' and 'Tom and Jerry,' and the fact that on the 19th day of November, 1894, the sheriff found the same is not proof that he had said prop-

erty in his possession on the 17th day of November, 1894, and it is for you to determine whether the state has proven the same or not."

This request was erroneous and rightly refused, because it made it obligatory upon the state to prove that the defendant had possession of the liquors named on November 17, the date mentioned in the information. Such, as we have already shown by the adjudications of this court, is not the law.

We decline to consider the assignment that the verdict is not sustained by sufficient evidence, because the "Raspberry Cordial," and "Eggine," or "Tom and Jerry," introduced in evidence in the lower court are not before us. To consider the remainder of the evidence without them might lead us to a wrong conclusion.

Objection is made to the overruling of the motion in arrest of judgment. It contained five grounds. Only two are here relied upon, namely, that the information does not state facts sufficient to constitute a crime and the several different offenses are improperly joined. Neither of the grounds possesses any merit. The two counts under which convictions were had are sufficient in form and substance, and we have already held that there was no misjoinder of offenses.

The overruling of the motion for a new trial is assigned as error. This assignment is too indefinite to be available, inasmuch as the motion for a new trial was based upon several distinct grounds. (*Conger v. Dodd*, 45 Neb., 39; *Glaze v. Parcel*, 40 Neb., 732; *Pearce v. McKay*, 45 Neb., 296; *Sigler v. McConnell*, 45 Neb., 598.)

Section 1, chapter 33, Laws, 1889 (Compiled Statutes, ch. 50, sec. 20), provides, *inter alia*, that "Hereafter it shall be unlawful for any person to keep for the purpose of sale, without license, any malt, spirituous or vinous liquors in the state of Nebraska, and any person or persons who shall be found in possession of any intoxicating liquors in this state with the intention of disposing of the same without license in violation of this chapter, shall

be deemed guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned as provided in section eleven of this chapter," etc. The foregoing makes a crime of each and every act of keeping for unlawful sale any one of the liquors enumerated in the section; in other words, the having in one's possession any vinous liquors for the purpose of sale without a license or permit is a separate and distinct offense from that arising from the keeping of any spirituous liquors for disposal in violation of law. We must not be understood as intimating that each day the liquors are kept for illegal sale constitutes a separate offense. On the contrary, the offense is a continuing one, and so long as there has been no interruption, there is but one keeping. The sixteenth count of the information charges the unlawful keeping for the purpose of sale without a license certain vinous liquors, consisting of a half barrel of "Raspberry Wine," and the seventeenth count charges the keeping for the same unlawful purpose certain spirituous liquors, consisting of two cases of "Tom and Jerry." Therefore two separate and distinct offenses are alleged, and the defendant having been convicted of both, a separate sentence for each within the limit fixed by section 11, chapter 50, Compiled Statutes, was properly imposed for each offense. (*State v. Pischel*, 16 Neb., 490; *Smith v. State*, 32 Neb., 105; *Nichols v. State*, 49 Neb., 777.)

It is finally insisted that said chapter 33 of the Session Laws of 1889 is unconstitutional, in that the title of the act is too restrictive, or not broad enough to include the legislation embraced thereunder. The precise question was before the court in *Re White*, 33 Neb., 812, and was decided adversely to the contention of this defendant. No sufficient reason has been suggested for disturbing the construction of the act given in that case, and it will be followed.

After a scrupulous consideration of the several assignments of error, and the able argument of counsel for the

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accused, we fail to discover any reversible error in the record, and the judgment is therefore

AFFIRMED.

JOHN REUTHER V. HENRY ZIMBLEMAN.

FILED JANUARY 7, 1897. No. 6885.

1. **Review: BILL OF EXCEPTIONS.** A bill of exceptions will be disregarded upon review unless certified by the clerk of the trial court to be the original or a true copy.
2. **Instructions: REPETITIONS.** It is not reversible error to refuse an instruction like one already given to the jury.

ERROR from the district court of Fillmore county.
Tried below before HASTINGS, J. *Affirmed.*

John Barsby, for plaintiff in error.

Charles H. Sloan, *contra*.

NORVAL, J.

This was an action by John Reuther against Henry Zimbleman for the recovery of damages claimed to have been sustained by the plaintiff by the discharge of surface waters upon his lands by the defendant. The answer admits that, by the cutting of a ditch by the defendant, the waters of a pond on the land previously having no outlet were discharged upon plaintiff's premises, denies that any damages were thereby sustained by plaintiff, and avers that such waters flowed in a natural waterway which crossed the lands of the latter. From a verdict and judgment in favor of the defendant, error is prosecuted by the plaintiff.

Three assignments of error are argued, the first being that the verdict is not sustained by the evidence. This assignment is not available, for the reason that the pur-

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ported bill of exceptions is not authenticated by the clerk of the trial court to be the original or a true copy. (*Felber v. Gooding*, 47 Neb., 38; *Childerson v. Childerson*, 47 Neb., 162; *Romberg v. Fokken*, 47 Neb., 198; *Wood v. Gerhold*, 47 Neb., 397; *Andres v. Kridler*, 47 Neb., 585; *Sieberling v. Fletcher*, 47 Neb., 847.)

The next assignment is predicated upon the ruling of the court in refusing to permit plaintiff's witness, Henry Jacobs, to testify whether he had not received pay from the defendant as damages on account of the water flowing from the pond on the land owned and occupied by the witness. This objection cannot be considered, since the bill of exceptions is not authenticated.

It is finally insisted that the court erred in refusing plaintiff's second request to charge, which is as follows:

"2. To cause water to wrongfully flow onto the land of another which would not flow there naturally is to create a nuisance in itself, and calls for at least nominal damages."

The principle enunciated in the foregoing, at least so far as it stated the correct rule, was fairly submitted to the jury by the third, fourth, and fifth paragraphs of the instructions given by the court on its own motion; hence, the failure to give plaintiff's instruction is not a ground for reversal. (*Beavers v. Missouri P. R. Co.*, 47 Neb., 761.) The judgment is

AFFIRMED.

STATE OF NEBRASKA, EX REL. MICHAEL MORRISSEY ET AL., V. BASIL S. RAMSEY, JUDGE.

FILED JANUARY 7, 1897. No. 8917.

1. **Review: SUPERSEDEAS.** The filing of a supersedeas bond is not essential to obtain a review of a decree or final order of the district court, either by appeal or upon error; but such bond is indispensable to a stay of proceedings pending the review.

2. ———: ———. Such bond, when filed and approved, will not operate as a supersedeas unless it contains the conditions prescribed by law.
3. ———: ———. A proper supersedeas bond executed, filed, and approved in one cause will not act as a supersedeas of a decree subsequently rendered in another action between the same parties.
4. Pleading: DEMURRER. Averments of legal conclusions in a pleading are not admitted by a demurrer.

ORIGINAL application for *mandamus* to compel respondent, as judge of the second judicial district, to recall an order of sale issued by the clerk of the district court of Cass county upon a decree of foreclosure. *Dismissed.*

A. N. Sullivan, for relators.

Byron Clark and C. A. Rawls, contra.

NORVAL, J.

This was an original application for a peremptory writ of *mandamus* to require the respondent, as judge of the second judicial district, to recall an order of sale issued by the clerk of the district court of Cass county upon a decree of foreclosure rendered therein. The respondent has filed a general demurrer to the application, which has been argued and submitted.

The application is exceedingly verbose, but the following is believed to be a fair summary of its material averments: On the 16th day of October, 1893, relators, Michael Morrissey and Susan C. Morrissey, made, executed, and delivered to the Citizens Bank of Plattsmouth their mortgage deed, whereby they conveyed to the bank certain lands situate in Cass and Platte counties, to secure the payment of their promissory note for \$10,000, with five interest coupons attached of \$700 each; that on September 10, 1894, one Charles C. Parmele was duly appointed receiver of said bank, who entered upon the duties of his trust and has been so acting as receiver ever since; that on December 27, 1895, the relators and said receiver, and others interested in the said bank, entered

into an agreement, subject to approval by the court, for the settlement of said mortgage, by the terms of which relators were to convey to the receiver certain lands, consisting of 480 acres, at the agreed price of \$43 per acre, in satisfaction of the amount due on said real estate mortgage, also two other notes of the relators, for \$779 and \$80, respectively, leaving a balance due them from the bank of the sum of \$2,976, including a deposit of \$107; that on the same day the district court rendered a decree canceling said real estate mortgage, and awarded relators a vendor's lien upon said land for said sum of \$2,976; and they executed a deed to relators for said real estate, which conveyance was duly recorded in the office of the register of deeds of Cass county, and the receiver canceled said notes upon the books of the bank. On April 30, 1896, on the petition and application of one D. O. Dwyer, a creditor of said bank, the district court of Cass county entered a decree setting aside the said decree of December 27 approving the settlement with the Morrisseys, and also ordered said receiver to proceed at once to foreclose said mortgage, and that the said deed from Morrisseys be canceled of record. A motion for a new trial was filed and overruled, and supersedeas bond fixed by the court at \$2,500; that "on the 12th day of June, 1896, these relators filed a supersedeas bond as required by law, which was duly approved by the clerk of said court;" that on the 10th day of October, 1896, a transcript of the proceedings and a petition in error were filed in this court, and a summons in error was issued, which was served upon the parties interested; that on May 25, 1896, in pursuance of said last mentioned decree, the said receiver commenced a suit in the district court of Cass county to foreclose said mortgage, and that the relators filed no answer therein and a decree of foreclosure was rendered as prayed. Subsequently, relators filed a motion, accompanied with an affidavit, setting forth the giving of the supersedeas bond as aforesaid and its approval by the clerk of the court. We are not definitely

advised as to the object of this motion, but **presumably** it was presented for the purpose of preventing further proceedings under the decree of foreclosure. The motion, whatever its scope and object, was overruled on November 18, 1896. The receiver was directed to proceed under said decree. An order of sale was issued and delivered to the sheriff, who is proceeding to sell the mortgaged premises, and relators have frequently requested the respondent, as judge of the district court, to recall the same, which he refuses to do.

There is no merit in the application. It is not claimed that any written request for a stay of the issuance of an order of sale upon the decree of foreclosure has been filed, as might have been done under section 477b of the Code of Civil Procedure. The record fails to disclose that any appeal has been taken, or proceedings in error prosecuted, from said decree foreclosing the mortgage, or that any supersedeas bond has been given under the provision of either section 588 or section 677 of the Code. The relators having neglected to avail themselves of the benefits of the statute relating to stays of orders of sales, and having taken no steps to obtain a review of said foreclosure decree, by either giving a supersedeas bond or by filing a transcript of said decree, it is not discoverable that they are in any position to invoke the aid of the court to prevent the enforcement of the decree in question by requiring the respondent to recall the order of sale from the hands of the sheriff before he has executed its mandate.

We are asked to hold that the supersedeas bond given by the relators on June 12, 1896, operated to suspend the decree foreclosing the mortgage. This cannot be done, for two reasons. In the first place, such bond was not filed in the foreclosure suit, but was executed and approved in another case or proceeding, before the action to foreclose the mortgage was ever commenced or the decree therein was extended. Manifestly a supersedeas bond furnished in one cause will not operate to suspend or prevent the enforcement of a judgment or decree ren-

dered in another and different action. Suppose a supersedeas bond should be given upon the rendition of a decree foreclosing a mortgage, and the plaintiff should bring another action in the same court upon the identical mortgage and obtain another decree of foreclosure; such bond would not supersede the second decree. The supposed case and the one before us are not distinguishable in principle.

There is another reason for refusing to hold that the said bond executed by the relators did not operate as a supersedeas, and that is it is not disclosed by this record that it was conditioned as prescribed by statute. The copy of the bond is neither attached to nor made a part of the application for *mandamus*; nor are the conditions of such bond set out in the application filed therein. The only allegation therein upon the subject is that "on the 12th day of June, 1896, these relators filed a supersedeas bond as required by law," which is the mere averment of a legal conclusion from facts not stated, and therefore not admitted by the demurrer. A supersedeas bond not conditioned as required by statute is insufficient to prevent the enforcement of the decree it was given to supersede. (*State v. Thiele*, 19 Neb., 220; *O'Chander v. State*, 46 Neb., 10.)

In view of the conclusion reached, it is unnecessary to discuss the proposition whether *mandamus* will lie against the respondent to compel the performance of a judicial act. The application fails to set forth sufficient facts to entitle relators to the relief demanded. The demurrer is sustained and the action

DISMISSED.

MAUD WALLACE V. SCHOOL DISTRICT NO. 27, SALINE COUNTY.

FILED JANUARY 7, 1897. No. 6902.

- 1. Schools and School Districts: TEACHERS: CONTRACTS OF EMPLOYMENT.** Plaintiff entered into a written contract of employment as teacher with a school district for the term of three months, commencing at a stated time, with option to her to teach the school year if satisfaction was given. She taught under the contract the three months, exercised the option given her, and remained in the employ, without objection, another three months, when she was discharged without good or sufficient cause, before the close of the school year. *Held*, That the services rendered after the first three months were performed under said contract, and a new written contract was not necessary to bind the district for the entire school year.
- 2. ———: ———.** In the absence of a stipulation in the contract to the contrary, under the existing statute, a qualified teacher cannot be discharged at the pleasure of the district, but only where just cause exists therefor.
- 3. ———: ———: ———.** *Jones v. City of Nebraska City*, 1 Neb., 176, distinguished.
- 4. ———: ———: ———.** If a teacher duly employed in the public schools for a specified period is dismissed by the school board prior to the expiration of the term of employment, without being shown to be incompetent, or for other good reason, the district is liable therefor.
- 5. ———: ———: ———: PLEADING.** *Held*, That the petition stated a cause of action.

ERROR from the district court of Saline county. Tried below before HASTINGS, J. *Reversed*.

F. I. Foss, O. M. Quackenbush, and W. R. Matson, for plaintiff in error.

Hastings & McGintie and A. S. Sands, contra.

NORVAL, J.

This is a petition in error to review the judgment of the district court sustaining a general demurrer to plaintiff's

petition, in an action by a school teacher against a school district for the alleged breach of contract of employment. Plaintiff alleges in her petition that she is and was a qualified teacher of Saline county; that on the 7th day of September, 1891, she entered into a written contract with the defendant to teach its school for the term of three months, commencing on said date, with privilege of school year of nine months providing satisfaction was given, for which service defendant agreed to pay her the sum of \$40 per month; that in pursuance of said contract she taught defendant's school for six months, that being the fall and winter terms; that in the month of March, 1892, and a few days prior to the close of the winter term, all the officers of the defendant came to plaintiff and agreed that she had given good satisfaction, and it was then and there agreed between plaintiff and defendant that she should teach the balance of the school year, the spring term of three months, under the written agreement then in force, commencing on March 14; that a few days prior to said date plaintiff's mother was taken violently ill, of which fact defendant was apprised by plaintiff, and at her request a few days' delay was granted by the defendant to commence the school; that on the 15th day of March defendant discharged plaintiff and refused to permit her to further perform said contract, and without any reasonable cause or excuse refused to allow plaintiff to continue in the employ as agreed, although she was ready and willing to commence at once, and immediately so informed the officers of the district; that she made all proper and reasonable endeavor to secure other employment, but was unable to do so, to her damage in the sum of \$120. The contract attached to and made a part of the petition is as follows:

"This agreement, entered into this 7th day of September, 1891, between school district 27 of Saline county, Nebraska, and Maud Wallace, a qualified teacher of said county, witnesseth: That the said Maud Wallace agrees to teach the school of said district in a faithful and effi-

cient manner for the term of three (3) months and privilege of school year, providing satisfaction is given, commencing on the first Monday in September, 1891, and agrees to keep herself qualified and agrees in all things to observe the rules and regulations of the district board. In consideration whereof said school district agrees to pay said Maud Wallace the sum of \$40 per month for said services, and agrees to keep the schoolhouse in good repair and provide necessary fuel; provided, that in case said Maud Wallace shall be discharged for sufficient cause by the district board, or shall have her certificate annulled, she shall not be entitled to any compensation from and after such dismissal or annulment.

"In witness whereof, we have hereunto subscribed our names this 7th day of September, A. D. 1891.

"E. A. ALLEN, *Director*.

"MAUD WALLACE, *Teacher*.

"Approved:

"A. LUNDY, *Treasurer*."

It is contended by counsel for defendant that the contract limits the term of employment to a period of three months, commencing on the first Monday in September, 1891, and that neither party was bound at the end of that time unless a new contract in writing was entered into. It is true that the contract fixed definitely the time plaintiff should teach in the first instance at three months, and her services could not have been demanded by the district after that period without she exercised the privilege or option given by the contract; but it does not follow that a new contract in writing was necessary to entitle her to longer remain in the employ of the defendant. It was expressly stipulated at the time of the hiring that she should have the privilege of teaching the school year, which, the petition avers, was nine months, in the event she gave satisfaction. This option, the petition shows, she exercised, and the defendant accepted her services under the contract for six months, the officers of the district representing that she had given good satisfaction.

There was no want of mutuality when she availed herself of the option and continued to render services, which were accepted, beyond the three months' term. After that she was under obligation to continue to teach the entire school year, and the defendant was likewise bound to pay her the contract price. Her services rendered beyond the term of three months were not performed without any written contract, but under and in pursuance of the one above set out. No new or additional written agreement was required to bind either party. (Clark, Contracts, sec. 936.)

It is said plaintiff did not tender her services to the district for the time for which she seeks to recover, nor did she go to the schoolhouse to continue her employment. The petition avers that she requested the members of the board to permit her to so do; that they refused and informed her they would oust her from the building if she attempted to teach. This shows a sufficient offer to perform the contract on her part.

Another contention is that a school district has the power to discharge a teacher at any time, and when it exercises that right its decision is final and conclusive. On this question we are cited to *Jones v. City of Nebraska City*, 1 Neb., 176, and *Bays v. State*, 6 Neb., 167. The first case was founded upon a statute not now in existence, which in express terms conferred authority upon school boards to remove teachers at pleasure, and the court rightly held that this law entered into and formed part of the contract of hire, and that the teacher could be discharged by the board before the expiration of his employment, whether sufficient cause for dismissal existed or not. The statute under which that decision was rendered not now being in force, the case is not a precedent for any holding that this plaintiff is not entitled to recover. The court in *Bays v. State*, *supra*, construed sections 45 and 56 of chapter 68, General Statutes. By section 45 a majority of the members of the district board were empowered to "hire qualified teachers for and in the

name of the district," and by section 56 the board was given "the general care of the school, and may establish all needful regulations for the management not in conflict with rules prescribed by the superintendent." It was held, as an incident to the powers invested in a school board by said sections, that it had the right to dismiss for incompetence or any other sufficient cause. LAKE, C. J., after quoting the sections referred to, observes: "This language is somewhat general, but we think the authority is clearly implied for the board to discharge a teacher who, for any reason, is found to be incompetent. The authority to terminate the employment of a teacher must rest somewhere, and in the absence of an express provision on this subject it should, we think, be governed by the general rule of the common law applicable in analogous cases, and be held to reside with those whose duty it is to represent the district in making the contract, and who are directly responsible for the successful management of the school. By the common law, if a servant neglect the duties of his employment, or is incompetent to perform them with reasonable skill, he may be discharged at once, although hired for a definite time which has not yet elapsed. And where a servant is formally discharged, even although it be without adequate cause, he cannot continue the service against the will of his employer, but must seek redress by an action for damages." The sections of the statute under consideration in that case, as respect the power of district boards in the matter of hiring teachers and the management and general care of the schools, are substantially the same as section 11, article 4, and section 3, article 5, of our present school law; hence, *Bays v. State* justifies the conclusion that a school board may dispense with the services of a teacher, if good cause therefor exists, prior to the expiration of his term of employment, although no such express power is given in the statute. The question whether a teacher can recover damages against the district for a wrongful discharge was not before

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the court in the case in 6 Nebraska, nor was any opinion there expressed upon the question. Applying the rule of law which governs the breach of contracts for hire entered into between individuals, it is very evident that a school district is liable for the damages sustained by a teacher on account of being dismissed by the board where no good and valid ground exists for such discharge. The court must not be understood as holding that such an action can be maintained where the contract of employment authorizes the school board to dispense with the services of the teacher whenever it chooses to do so. This contract confers no such power upon the defendant. Plaintiff obligated herself to give satisfaction, and it is averred in the petition, and by the demurrer admitted to be true, that the members of the board informed her that she had given satisfaction.

It is further urged that the petition fails to allege that plaintiff was not discharged for good cause or incompetency, therefore it will be presumed that the board had good cause for its action; and there can be no recovery. Counsel for defendant must have misread the petition. It is there averred that the defendant, "without any reasonable cause or excuse whatever, refused to suffer this plaintiff to continue in its employ." This shows that the discharge was wrongful. We are constrained to hold that the petition stated a cause of action, and that the court erred in sustaining the demurrer. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

GOTTLIEB STORZ ET AL. V. LENA FINKLESTEIN, ADMINIS-
TRATRIX, ET AL.

FILED JANUARY 7, 1897. No. 6308.

1. **Attachment: ACTION ON BOND: BURDEN OF PROOF.** In an action on an attachment bond, where the answer is a general denial of the averments of the petition, the burden is upon the plaintiff to show that the attachment was wrongfully issued; that is, that the averments in attachment affidavit as ground for the writ were untrue. RYAN and RAGAN, CC., dissenting.
2. ———: ———: **INSTRUCTIONS.** An instruction in such a case which permits the jury to return a verdict for the plaintiff if they find that the attachment was merely dissolved, *held erroneous*. RYAN and RAGAN, CC., dissenting.
3. **Review: INSTRUCTIONS.** A judgment will not be reversed for errors committed in giving instructions where it is not shown the unsuccessful party could have been prejudiced thereby.
4. **Attachment: BOND: SIGNATURES.** An attachment bond is valid without the signature of the attaching plaintiff, and where he does not sign the bond he is not liable thereon to defendant in attachment. RYAN and RAGAN, CC., dissenting.

REHEARING of case reported in 48 Neb., 27. *Reversed in part.*

Lake, Hamilton & Maxwell, for plaintiffs in error.

Estabrook & Davis and *Charles E. Clapp*, *contra*.

NORVAL, J.

Louis M. Finklestein recovered judgment in the court below against Gottlieb Storz, Joseph D. Iler, and Theodore Olsen upon an attachment bond. The defendants jointly and severally prosecuted error to this court, and a judgment of reversal was entered at the last term, the opinion being reported in 48 Nebraska, 27. A motion for a rehearing, based upon three grounds, was sustained, and the cause again submitted for consideration.

It is urged that the judgment of the lower court should, in any event, be affirmed as to the defendant Olsen. The

judgment as to him was reversed for the giving of this instruction:

"1. In order that plaintiff may recover in this action, he must satisfy you by a preponderance of all the evidence: First, that defendants Storz and Iler, in a suit brought by them against him, caused an attachment to be issued and levied on his bottling works; second, that said attachment was dissolved in due course of law; third, as to the amount of damages, if any, suffered by him as a direct result of the issuance and levy of said attachment; fourth, that the attachment bond was duly executed by defendant Olsen."

An examination of the briefs and arguments has failed to convince the writer that this instruction stated the correct rule applicable to the issues made by the pleadings either as to Olsen or his co-defendants. It will be observed that the suit is upon an attachment undertaking conditioned in accordance with the provisions of section 200 of the Code of Civil Procedure, "that the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment if the order be wrongfully obtained." There is no possible room for doubt that no liability arises upon such a bond unless the attachment was wrongfully issued, and the burden of establishing that fact is upon the plaintiff. No decision rendered under a statute like our own holds the contrary to be true. The element of the wrongful issuance of the attachment was omitted from the instruction quoted except it is contained in the second subdivision thereof, namely: "That said attachment was dissolved in due course of law." In the former opinion it was held that this language was not sufficient to show that the attachment was wrongfully sued out, and that view is evidently sound, inasmuch as the attachment may have been dissolved for mere defects, omissions, or irregularities committed by the officer in issuing the writ. Doubtless, the discharge of an attachment on a finding in favor of the defendant, on an issue as to the truth of the facts alleged

as the ground for the writ, is conclusive between the parties in an action on the bond that the writ was wrongfully obtained, unless it has been reversed on error. (*Hoge v. Norton*, 22 Kan., 374; *Mitchell v. Mattingly*, 1 Met. [Ky.], 237; *Boatwright v. Stewart*, 37 Ark., 614.) But the instruction under consideration failed to inform the jury that they must find the attachment was discharged for want of sufficient grounds for the obtaining of the writ to justify a recovery on the bond. The effect of the instruction was to withdraw from the consideration of the jury whether the attachment had been wrongfully obtained, and to allow a recovery if they found the writ had been discharged for any cause. The authorities generally hold that an attachment is not wrongfully obtained unless it is shown that the plaintiff has no meritorious cause of action against the defendant, or having such a cause of action, the ground stated in the attachment affidavit is untrue. The word "wrongful," as used in the statute, does not apply to a dissolution of an attachment on account of defects in the form of the proceedings or for mere omissions, irregularities, or informalities which the officer may have committed in the issuance of the process.

The statute of Florida requires the plaintiff in attachment to give a bond with at least two or more sureties in double the amount claimed conditioned "to pay all costs and damages which the defendant may sustain in consequence of improperly suing out said attachment." (Statutes of Florida, 1892, sec. 1046.) The court, in construing the above provision in *Steen v. Ross*, 22 Fla., 480, say: "We think the word 'improperly,' as used in the statute, has a broader signification than a mere irregularity, and that it is insufficient to allege as a breach of the condition, although in the express words of the bond, that it was improperly issued. The breach should state with distinction in what its impropriety consisted. It is only improperly issued when the plaintiff has no meritorious cause of action, of that class of actions in which the law

authorizes a resort to the remedy against the defendant, or having such a cause of action the ground alleged in the affidavit for its issue is untrue, or not one of the grounds enumerated which must exist before it can be obtained. We do not think it was intended to cover a case where the plaintiff had a meritorious cause of action of the class for which an attachment may legally issue, and when the cause for its issuance is one of those specified in the statute, and such cause is true if the attachment was dissolved for some irregularity or for some technical reason." The doctrine announced in the foregoing is stated with approval in Drake on Attachment, sec. 170, and Shinn on Attachment & Garnishment, secs. 183, 187.

Sharpe v. Hunter, 16 Ala., 765, was a suit upon an attachment bond conditioned substantially like the one at bar. The order for attachment was quashed for a defect in the affidavit upon which it issued. The trial court charged the jury that if they believed the writ of attachment sued out was abated on plea, the plaintiff was entitled to recover his actual damages sustained. The supreme court held this instruction erroneous. Chilton, J., in the course of his opinion, observed: "What is meant by the term 'wrongful' as used in the statute to which this bond conforms? Was it, as is contended by counsel for the defendant in error, designed to apply to defects in the form of the proceedings, on account of which the attachment should be quashed, as well as to the ground upon which it was to be issued? Or was the object of the framers of the act merely to provide a remedy against persons who should resort to this extraordinary remedy to the prejudice of another, without cause or sufficient ground therefor? It is, to my mind, perfectly clear that the latter construction is the correct one. * * * We think that by the wrongful suing out of the attachment is meant, not the omissions, irregularities, or informalities which the officer issuing the process may have committed in its issuance, but that

the party resorted to it without sufficient ground. The case of *Kirksey v. Jones*, 7 Ala., 622, not only fully sustains this view, but goes quite beyond it. So far as it conforms to this construction of the statute, we fully approve of that decision."

City Nat. Bank v. Jeffries, 73 Ala., 183, was founded on an attachment bond. The court on defining the term "wrongful" say: "The meaning of this is, not that the attachment proceedings are faulty and liable to be abated or quashed. Such defects furnish no grounds for recovery of damages. To be 'wrongful' within the statute, none of the statutory grounds for attachment must exist. (*Sharpe v. Hunter*, 16 Ala., 765; *Drake*, Attachment, sec. 170; *Durr v. Jackson*, 39 Ala., 203.) To justify an attachment there must be a debt, due or to become due, and one of the enumerated statutory grounds for attachment must exist. (*Lockhart v. Woods*, 38 Ala., 631; *Durr v. Jackson*, *supra*.) If either of these be wanting in fact, no matter how sincerely the attaching creditor may believe it to exist, then the attachment is wrongful. In such case the measure of recovery in a suit on the bond is the actual injury sustained. * * * And in such action the *onus* rests with the plaintiff to prove the falsity of the affidavit, or, what is the same thing, the nonexistence of the ground on which the attachment was sued out."

In *Calhoun v. Hannan*, 87 Ala., 277, it was ruled that an action could not be maintained on an attachment bond unless the attachment was wrongfully sued out; that is, unless it was issued without the existence of any one of the facts which authorize a resort to the process.

In *Garretson v. Zacharie*, 8 Martin, n. s. [La.], 481, it was decided that the surety on an attachment bond is not liable when the attaching creditor failed in his cause of action by reason of some irregularity in the proceedings, posterior to the bond.

In *Pettit v. Mercer*, 8 B. Mon. [Ky.], 51, it was decided that the mere failure of the plaintiff in attachment to

prosecute his suit to judgment does not constitute a breach of the condition of the bond. To the same effect are *Cooper v. Hill*, 3 Bush [Ky.], 219, and *Nockles v. Eggspieler*, 47 Ia., 400.

In the first opinion filed herein, *Eaton v. Bartscherer*, 5 Neb., 469,—two cases,—was cited to sustain the doctrine that a suit on an attachment bond cannot be maintained merely on account of the attachment having been dissolved for omissions or irregularities in issuing the writ. A reference to the opinion will disclose that it is decisive of the question under consideration. Both of those cases were suits upon attachment undertakings conditioned, like the one before us, according to the requirements of the statute. The petitions averred that the attachments were dissolved on proceedings in error, but contained no allegation showing that the orders of attachments were wrongfully issued. This court, by LAKE, C. J., held that each petition failed to state a cause of action. In the opinion it is said: "The undertakings upon which these actions were brought contain simply the statutory requirements, by which the obligors therein promise to pay the defendant all damages which he might sustain by reason of the attachments, if the orders therefor were 'wrongfully obtained.' There is no agreement to pay all damages that might be occasioned by the attachments, in any event, but only in case it should be established that the orders of attachment were 'wrongfully' sued out. In these petitions there is no charge that these orders of attachment were wrongfully or unjustly obtained, nor is there any statement from which that fact can possibly be inferred. There is, to be sure, in each of them an allegation that after the attached property had been sold, and the proceeds applied upon the judgment in pursuance of the order of the court, proceedings in error were prosecuted which resulted in the dissolution of the attachments. But there is nothing to show upon what this decision was based; and for aught that appears, it may have been for a mere tech-

nality, or for some other cause entirely consistent with the fact that the plaintiffs were fully justified in resorting to the process of attachment for the collection of their claims." The chief justice, after quoting from the opinion in *Sharpe v. Hunter*, 16 Ala., 765, that "by the wrongful suing out of the attachment is meant, not the omissions, irregularities, or informalities which the officer issuing the process may have committed in its issuance, but that the party resorted to it without sufficient grounds," says: "The following are authorities on the same point under statutes quite similar to our own: *Pettit v. Mercer*, 8 B. Mon. [Ky.], 51; *Raver v. Webster*, 3 Ia., 502. We are of the opinion, therefore, that in failing to allege, or show by reasonable inference, that the orders of attachment were 'wrongfully' sued out, or, in other words, that no just grounds actually existed for a resort to this extraordinary process, these petitions are fatally defective and wholly inadequate to support these judgments." The principle underlying those cases is clearly applicable to the question now under consideration. It was distinctly ruled that a petition on an attachment undertaking is fatally defective which fails to show the order of attachment was wrongfully procured, and further, that no reasonable or just inference that the writ was so obtained can be drawn from the mere averment of the dissolution of the attachment. It cannot be successfully claimed that the petitions in those cases failed to aver the attachments had been dissolved, or that the effect of the pleadings was "that the court had made an order sustaining the attachments and ordering the attached property sold, and that the defendants in those actions had by proceedings in error suspended the judgments, and therefore they concluded that suspending the judgments rendered in those actions had discharged the attachments." The petition in each of these cases on file in this court, after setting forth the recovery of judgment by attachment plaintiffs in a justice court for a specified sum and an order for the sale

of the attached property, alleges that a petition in error was prosecuted to the district court, and that "it was considered and adjudged by said court that said order of attachment be dismissed and discharged, and the property thereby attached be released therefrom." From this it affirmatively appeared that the order of attachment had been dissolved and vacated. If a petition is not good which merely avers the dissolution of an attachment, because such an allegation does not show the attachment was wrongfully sued out, it requires no argument to show that the instruction quoted was erroneous, since it permitted a recovery on the bond whether the attachment was wrongfully sued out or not. While the attachment in this case was dissolved, there is nothing in the record to show us upon what ground the order of dissolution was entered. It may have been based upon mere irregularities, omissions, or technical objections, and if so, under the authorities cited the order of dissolution would not be *prima facie* evidence that the writ was wrongfully issued.

In the last brief filed by plaintiffs below they say they do not question the soundness, as an abstract proposition, of the criticism made in the former opinion upon this instruction, but it is insisted that the instruction was not prejudicial to the defendants. As to Storz & Iler this contention is not well founded, for the reason the charge of the court permitted the jury to find against them even though they did not execute the bond. The instruction on the question of signing the undertaking only required them to find that it was executed by Olsen. The instrument declared on disclosed on its face that Storz & Iler never signed; hence they were not liable thereon to the attaching creditor, as we shall presently show. The writer is, however, convinced upon further reflection that the record fails to establish that Olsen was in any manner prejudiced by this instruction. In the previous opinion it was mentioned that the bill of exceptions on its face revealed the fact that it did not contain all the

evidence adduced on the trial. It must, therefore, be presumed that the evidence before the jury was sufficient to establish that the attachment was wrongfully issued, and that it was dissolved for that reason. If such was the testimony, and it must be presumed in the absence of a showing to the contrary, then Olsen was not prejudiced by the charge of the court, unless that portion of the testimony incorporated in the bill of exceptions reveals that the question of the wrongful issuance of the attachment was a controverted or disputed fact. The testimony brought up does not disclose, nor tend to prove, that there was any ground for the attachment, nor is there anything in the record tending to controvert the fact that the attachment was sued out wrongfully, and without just cause for resorting to this extraordinary process. It is true the bill of exceptions contains testimony to the effect that Finklestein, at the time of the attachment, was indebted to Storz & Iler; that he was occupying their building and had removed a portion of his goods to Council Bluffs, and was about to remove the remainder to the same place, for the purpose of engaging in business there. But their testimony falls far short of establishing any one of the grounds for an attachment enumerated in the Code, since the element of fraudulent intent is lacking. In the absence of testimony tending to prove the attachment was not wrongfully obtained, it cannot be said there was any reversible error in not submitting that question to the jury. Error cannot be presumed, but must affirmatively appear to justify the reversal of a judgment. In the absence of a portion of the testimony this court cannot say that any prejudice was wrought by this instruction. It is the settled doctrine of this court that an erroneous charge will not work a reversal when it is not shown the party complaining could have been possibly prejudiced by its giving. (*Ryan v. State Bank*, 10 Neb., 524; *Converse v. Myer*, 14 Neb., 190; *Knowlton v. Mandeville*, 20 Neb., 59; *Western Union Telegraph Co. v. Lowery*, 32 Neb., 732; *State v. Hill*, 47 Neb., 456; *Burlington & M. R. R. Co. v. Gorsuch*, 47 Neb., 767.)

Another argument in the brief is that "section 200 of the Code, having been construed in *Eckman v. Hammond*, 27 Neb., 611, as dispensing with the necessity of the plaintiff in attachment signing the bond, it conclusively follows that his signature to the bond is presumed, and his primary obligation to pay damages for his wrongful attachment is created by statute." It is true this court, in *Eckman v. Hammond*, *supra*, decided that section 926 of the Code of Civil Procedure, which is substantially the same as section 200, does not require that an undertaking in attachment be signed by the plaintiff, but that if it be signed by a surety alone, the bond is sufficient. It does not, however, follow from this holding that the signature of the plaintiff is presumed, and that he is liable to the defendant in an action on the bond. If the plaintiff is not required to sign an attachment undertaking, how can it be presumed that he did so sign in the face of a record which shows he did not do so. It might be otherwise in case of a bond, which the statute requires to be signed by the principal named therein, which he has procured to be given and approved, but failed to subscribe his name thereto. (*State v. Hill*, 47 Neb., 456.) The bond in suit shows that Storz & Iler are not parties to it. It does not purport to bind them, but Olsen alone, to pay all damages sustained by Finklestein by reason of the wrongful suing out of the attachment, in case the attaching creditor fails to do so. This bond is an independent contract on the part of Olsen, and under our statute the signatures of Storz & Iler were not necessary. (*Eckman v. Hammond*, 27 Neb., 611; *Curtis v. Richards*, 9 Cal., 39; *City of Sacramento v. Dunlap*, 14 Cal., 424; *Murdock v. Brooks*, 38 Cal., 604; *Frankel v. Stern*, 44 Cal., 168.) The liability of Olsen, as between himself and the attaching creditor, is that of principal debtor. This principle was held and applied to the signers of an appeal undertaking in *Flanagan v. Cleveland*, 44 Neb., 59. In Indiana, as in this state (*Clark v. Strong*, 14 Neb., 229), the statute does not require an appellant to sign an appeal bond. The su-

preme court of Indiana held that an action will not lie against an appellant on an appeal bond which he did not sign. (*Supreme Council of Catholic Benevolent Legion v. Boyle*, 42 N. E. Rep. [Ind.], 828, 44 N. E. Rep., 56.) Applying the same doctrine to the bond in question, Storz & Iler are not liable thereon. It was never executed, nor intended to be executed by them. It was not their obligation, but the undertaking of Olsen alone.

Wolf v. Hahn, 28 Kan., 588, is not in point. That was not an action upon an attachment, nor any other kind of a bond. In that case Rhoda Parkin sued out an attachment against Jacob Poorman which was levied on certain personal property in the possession of Fred Hahn. Subsequently the latter procured one Wells to execute a re-delivery bond for the forthcoming of the property, or its appraisal, to answer the judgment. Thereupon the officer returned the attached property to Hahn, who retained possession until after judgment had been rendered in the attachment case, when he delivered the property to the officer, by whom it was sold. Afterwards Hahn commenced an action against the officer to recover the value of said property. In Kansas the statute requires a forthcoming bond to be executed by the person in whose possession the property is found, with one or more sureties. The court held that Hahn having procured the bond to be executed, he thereby estopped himself to deny that the attached property belonged to Poorman, the attaching debtor. That was the only question before the court in that case. Whether Hahn was liable on the bond was neither involved nor adjudicated.

Another case relied on is *Pierse v. Miles*, 5 Mont., 549, which was an appeal from an order dissolving an attachment, on the ground, among others, that the undertaking was not signed by the plaintiff in attachment. The court held the statute did not require him to sign it. The same question, and none other, was involved in *McIntosh v. Hurst*, 6 Mont., 287, where it was held it was no defense to an action against a surety on an undertaking to pre-

vent an attachment that the defendant in the action in which the undertaking was given did not sign the bond. It is obvious that neither of those cases is in point upon the question before us.

Hoskins v. White, 13 Mont., 70, 32 Pac. Rep., 163, was an action upon an attachment bond, signed only by the sureties. The court decided the plaintiffs in attachment were properly joined as parties defendant. The opinion cites *Jennings v. Joiner*, 1 Cold. [Tenn.], 645, which was an action upon an attachment bond executed by the plaintiff in attachment and another as his surety. It was properly held that the principal and surety could be joined in an action on the bond, since it was the obligation of both, both having executed the instrument. But it is not an authority for holding that an attaching creditor is bound upon an attachment undertaking which he never signed, and was not required to execute in order to obtain the writ.

Shinn, Attachment & Garnishment, sec. 169, states that "the sureties, by executing the bond, and the plaintiff, by invoking the writ only, all become liable to actual damages occasioned by the wrongful issuing of the writ." The only decision cited by the author to sustain the doctrine is *State v. Fortinberry*, 54 Miss., 316. There the attachment bond was executed by the plaintiff in attachment and sureties, so that the proposition above quoted, which was taken from the opinion in that case, was mere *obiter*.

Attention is called to sections 41 and 50a of the Code of Civil Procedure, which read as follows:

"Sec. 41. Any person can be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein."

"Sec. 50a. Any person who has or claims an interest in the matter in litigation, in the success in either of the parties to an action, or against both, in an action pending

or to be brought in any of the courts of the state of Nebraska, may become a party," etc.

These sections merely provide who may be made parties to a suit. Obviously they do not create any contract or statutory liability. They certainly confer no authority for holding that one who does not sign an attachment bond is liable thereon. Conceding that Storz & Iler, by reason of their implied promise to make good to Olsen any damages he might be compelled to pay by reason of the wrongful suing out of the attachment, have such an interest in this litigation adverse to the attaching debtor as to make them proper parties in this litigation, it is no reason for holding them liable on this bond to the plaintiff. They had the right to set off against their claim of the attaching debtor the amount of the judgment they recovered against him in the attachment suit, not because they are primarily liable to Finklestein for the damages committed by the wrongful attachment, but for the reason they are required to reimburse Olsen for whatever sum he is compelled to pay to satisfy the judgment obtained against him. (*Gerson v. Harrison*, 34 Kan., 590.) The question in this case is not whether under our Code Storz & Iler are proper parties defendant, but are they liable to the attaching debtor on an undertaking which they never signed, and which does not on its face purport to bind them? The answer must be in the negative. It follows that the judgment should be affirmed as to Olsen, and reversed and dismissed as to Storz & Iler.

JUDGMENT ACCORDINGLY.

IRVINE, C., not sitting.

RAGAN and RYAN, CC., dissenting.

Section 41 of the Code of Civil Procedure provides: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." Cer-

tainly the plaintiff in the attachment suit has an interest in this case adverse to that of the plaintiff herein. If this suit proceeded to judgment against the surety on the attachment bond only, then the plaintiff in the attachment would be liable to the attachment surety for whatever sum the latter might be compelled to pay on that judgment. What are the questions involved in this action? Whether such attachment was wrongfully obtained, and, if so, what damages the defendant thereto has sustained thereby; and certainly the plaintiff in the attachment suit is a necessary party to a complete determination or settlement of these questions. This section of our Code was copied from the Code of Ohio, and in *Osborn v. McClelland*, 43 O. St., 284, the supreme court of that state declared that this section was a legislative adoption of the equity rule for the prevention of a multiplicity of suits; and in *Penn v. Hayward*, 14 O. St., 306, the court held that this section of the Code was permissive, and whether one should be made a party defendant to an action was somewhat discretionary, but the court declared that if the effect of omitting a defendant would necessitate another suit, the discretion of the district court should be limited. Section 50a of the Code of Civil Procedure provides that "any person who has or claims an interest in the matter in litigation may intervene and become a party to such an action." If this suit, then, had been brought only against the surety on the attachment bond, we think it clear that the plaintiffs in the attachment suit would have had the right to intervene therein, as they were ultimately liable for the judgment rendered against the defendant in that action. Section 100 of the Code of Civil Procedure provides that "the defendant may set forth in his answer as many grounds of defense, counter-claim, and set-off as he may have;" and section 101 provides that "the counter-claim * * * must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of the con-

tract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." From the record before us it appears that the plaintiffs in the attachment suit recovered a personal judgment in their main action against the defendant in the attachment. Now, in this suit by the attachment defendant on the attachment bond for damages for the wrongfully obtaining of the judgment, and for the payment of which judgment the plaintiffs in the attachment suit are ultimately liable, it is clear that the plaintiffs in the attachment might counter-claim as against the plaintiff in this action the amount of their judgment, because it exists in their favor against the attachment defendant and it arises out of the transaction set forth in the petition herein. It was not necessary for plaintiff in the attachment to sign the undertaking (*Eckman v. Hammond*, 27 Neb., 611), but it was none the less the bond or contract of the plaintiffs in the attachment. Section 200 of the Code of Civil Procedure provides that an order of attachment shall not be issued until there has been executed by one or more sufficient sureties of the plaintiff in attachment an undertaking, and this undertaking shall be to the effect that the plaintiff in the attachment will pay the defendant in attachment all damages which the latter may sustain by reason of the attachment, if the order be wrongfully obtained. Olsen, who signed the attachment bond, was simply the surety of the plaintiffs in attachment. It was in law the bond—the contract—of the plaintiffs in the attachment suit. (*Wolf v. Hahn*, 28 Kan., 588.)

It is the policy of the Code that all disputes existing and arising between parties, growing out of the same transaction, shall be settled in one action. The question now under consideration was before the supreme court of Montana in *Hoskins v. White*, 32 Pac. Rep., 163. That was a suit on an attachment bond for damages because the order of attachment had been wrongfully obtained. The plaintiffs in the attachment suit had not

signed the undertaking, but had been joined as defendants with the surety in the suit thereon. The district court held that the plaintiffs in the attachment could not be joined as defendants in the suit, and this holding was reversed. It appears that the attachment law of Montana and the provisions of its Code in reference to parties to suits are similar to ours. The court said: "The subject of the action is the damage committed by the wrongful attachment. The principal and sureties are all liable for one and the same thing, to the amount for which the undertaking provides. * * * Section 16 of the Code of Civil Procedure provides that 'any person may be made defendant who has or claims an interest in the controversy adverse to the plaintiff.' Is not the principal, who caused the attachment and whom the sureties guaranteed would pay the damage, a party in interest adverse to the plaintiff? He is bound to reimburse the sureties for whatever they are compelled to pay on his behalf in the premises." (*McIntosh v. Hurst*, 6 Mont., 287; *Pierse v. Miles*, 5 Mont., 549; *Jennings v. Joiner*, 1 Cold. [Tenn.], 645.) In 1 Shinn, Attachment, section 169, it is said: "The sureties by executing the bond, and the plaintiff by invoking the writ only, all become liable to actual damages occasioned by the wrongful issuing of the writ. (See, also, *State v. Fortinberry*, 54 Miss., 316; *Waples*, Attachment & Garnishment [2d ed.], sec. 183.) We reach the conclusion, therefore, that in a suit upon an attachment bond for damages for wrongfully obtaining the attachment the plaintiffs in the attachment are proper parties defendant to such action, although they did not sign such bond; because they have an interest in the controversy adverse to the interest of the plaintiff; that the attachment bond is in law as much the bond and contract of the plaintiffs in the attachment as if they had actually signed it; and that in a suit upon such bond there is but one cause of action, namely, the wrongfully obtaining of the order of attachment, and on this cause of action the plaintiffs in the attachment and the surety

on the attachment bond are jointly and severally liable to the defendant in the attachment suit.

1. In the case at bar the plaintiff pleaded the issuing of the attachment; its levy upon the plaintiff's property; that the attachment was wrongfully obtained and was afterwards, by the court issuing it, discharged. The answer of the surety traversed these allegations, while the answer of the plaintiffs in the attachment admitted the dissolution of the attachment. The evidence shows that a motion was filed to discharge the attachment; that on the same day the plaintiffs therein filed affidavits in support of their attachment; that the defendant in the attachment filed affidavits in support of his motion to discharge, and that on hearing by the court the motion to dissolve the attachment was sustained. There is no intimation in the record that the order discharging the attachment was superseded, or that it was procured by collusion or fraud. The district court instructed the jury that to entitle the plaintiff in this case to recover they must find from the evidence, among other things, that the attachment had been dissolved in due course of law. On the former hearing we held that this instruction was erroneous, because the court did not tell the jury that to enable the plaintiff to recover they must find from the evidence not only that the attachment had been dissolved, but that it had been dissolved because the facts alleged to procure its issuance did not exist or were untrue. We think in that conclusion we were mistaken. To sustain us in that view we cited *Eaton v. Bartscherer*, 5 Neb., 469, but a careful examination of that case leads to the conclusion that it is not in point here. That case was a suit on an attachment bond, and the question was whether the petition filed stated a cause of action. This court said: "There is no agreement to pay all damages that might be occasioned by the attachments, in any event, but only in case it should be established that the orders of attachment were wrongfully sued out. In these petitions there is no charge that these orders of attach-

ment were wrongfully or unjustly obtained, nor is there any statement from which that fact can possibly be inferred. There is, to be sure, in each of them an allegation that after the attached property had been sold and the proceeds applied upon the judgments, in pursuance of the orders of the court, proceedings in error were prosecuted which resulted in the dissolution of the attachments. * * * We are of opinion, therefore, that in failing to allege or to show by reasonable inference that the orders of attachment were wrongfully sued out * * * these petitions are fatally defective," etc. It is obvious that in the petitions in those cases the plaintiffs not only failed to allege that the attachments had been wrongfully obtained, but they failed to allege that the attachment had ever been discharged. Their pleading, in effect, was that the main actions in which the attachments were issued had proceeded to judgment; that the court had made an order sustaining the attachments and ordering the attached property sold, and that the defendants in those actions had, by proceedings in error, suspended the judgments, and therefore they concluded that superseding the judgments rendered in those actions had discharged the attachments. We think, then, that we correctly held in that case that those petitions did not state a cause of action. But here the evidence shows that a motion was made to discharge the attachment; that affidavits were filed in support of the attachment and in support of the motion to discharge, and that on the hearing this attachment was discharged. The order dissolving this attachment was a judgment. The court could not have dissolved the attachment without finding that the order of attachment had been wrongfully obtained, and the finding and order made on the hearing to discharge the attachment conclude and estop the parties to the attachment proceedings. The language of the statute is that the plaintiff shall pay all damages which the defendant in attachment may sustain by reason of the attachment, if the order be wrongfully obtained.

When is an order of attachment rightfully obtained? It is rightfully obtained when the facts exist which the statute requires to exist to enable a party to avail himself of the attachment remedy, and when the party suing out an attachment complies with all the provisions of the law, such as filing an affidavit alleging certain things and the causing to be executed for the benefit of the defendant in attachment an undertaking conditioned as the law requires; and the converse is true, that the attachment is wrongfully obtained either when the facts do not exist which authorize the issuance of an attachment, or when the party suing it out has failed to comply with some requirement of the statute. Attachment is not a common-law remedy, but is purely a creature of the statute, and the same statute that has authorized a resort to the remedy by attachment has specifically pointed out what facts must exist before a resort to that remedy can be had; and it has quite as specifically provided just what the party resorting to the remedy shall do in order to be entitled to that remedy. If the necessary facts exist, and the party using the remedy complies with all the requirements of the statute, then the attachment is rightfully obtained and the sureties are protected. If none of the facts exist which the law says must exist in order that the remedy may be resorted to, or if the party using the writ does not comply with all the things with which the statute says he must comply, then the writ is wrongfully obtained. In other words, a party who resorts to the remedy of attachment does so at his peril; and the party who signs the attachment bond guaranties not only that the facts exist which the law requires shall exist in order that the remedy of attachment may be resorted to, but that the party using the writ has done and will do everything required by the statute to be done in order that he may avail himself of this extraordinary remedy. This brings us to the question of the effect as evidence of the judgment or order of the court dissolving an attachment when offered in evidence in a suit on an

attachment bond for damages for wrongfully obtaining the attachment.

Is this judgment or order dissolving the attachment conclusive evidence that the order of attachment was wrongfully obtained? There is a seeming conflict among the authorities, but this is largely due to the peculiar provisions of the attachment laws of the various states. The rule, and the correct rule, we think, is laid down in *Jerman v. Stewart*, 12 Fed. Rep., 266, where the court, in a suit upon an attachment bond, construing the attachment law of the state of Tennessee, said: "The wrongful suing out contemplated by these sections is conclusively proved by a judgment of the court in favor of the defendant in the attachment proceeding." In *Kennedy v. Meacham*, 18 Fed. Rep., 312, a suit for damages on an attachment bond for wrongfully issuing the attachment, the court charged the jury that the order dissolving the attachment was conclusive on the right of the plaintiff "to secure the actual damages resulting to him from the wrongful suing out of the attachment. The only possible question for you on this branch of the case is the amount of the actual damages." This case was another construction of the attachment law of the state of Tennessee, and the ruling was followed by the supreme court of that state in *Renkart v. Elliott*, 11 Lea [Tenn.], 235. In *McDaniel v. Gardner*, 34 La. Ann., 341, it was held that when "the judgment is simply one of non-suit, the fact of the dissolution of the attachment is a finality and entitles defendant to damages for a wrongfully taken attachment." In Drake, Attachment [7th ed.], section 185*b*, it is said: "Though a writ issued by competent authority and regular on its face will afford protection to an officer acting under it, it does not, if issued irregularly, afford the same protection to the party who caused its issue. The responsibility rests upon him not only to see that it is right in those particulars, but that it was regularly issued; for if it be set aside for irregularity, that makes the party a trespasser *ab initio* and affords him no protection as to

what has been done under it; as to him, it is then as though no process had ever been issued, and the property attached had been taken and detained by his order without any process." In *Seattle Crockery Co. v. Haley*, 33 Pac. Rep. [Wash.], 650, an affidavit for attachment alleged that defendant was about to dispose of its property with intent to defraud his creditors, and that it had so disposed of its property, or a part thereof. A traverse of such allegations was followed by an order to discharge the attachment, on the oral proofs of the parties, no findings being made. It was held that the order dissolving the attachment was a final adjudication that the attachment had been wrongfully obtained. *Hayden v. Sample*, 10 Mo., 215, was a suit upon an attachment bond. On the trial the defendants objected to the record of the proceedings which resulted in the discharge of the attachment. The court said: "But the truth of the affidavit made to obtain the attachment was not in issue here and could not be put in issue. The only inquiry in reference thereto and material in this case was the fact that an issue had been made, tried, and found against the plaintiffs, and that damages had by reason thereof accrued to the defendant." If in this action the defendants may retry the question as to whether the attachment was wrongfully obtained,—that is, whether the facts averred to obtain the attachment were true or existed,—then the order or judgment made by the court on hearing the motion to discharge the attachment was not binding upon any one. Suppose the petition in this case alleged the issuing of the attachment, the seizure of the property, a motion made to dissolve it, and that the court had overruled the motion and yet had averred that the attachments were wrongfully obtained. Can it be possible that the petition would have stated a cause of action on the attachment bond? Is it not clear that in such a case the order or judgment of the court sustaining the attachment would have been a conclusive adjudication that the attachment was rightfully obtained, and that the plaintiff-

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iff had no cause of action upon his bond? But estoppels must be mutual, and if such a judgment or order of the court would preclude the attachment defendant from a suit upon the bond, it seems impossible to escape the conclusion that the judgment or order dissolving the attachment is conclusive evidence against all parties to the attachment proceeding that the attachment had been wrongfully obtained. This judgment is as binding upon the surety of a bond as it is upon the plaintiff in the attachment proceeding.

The principle underlying this question under consideration was extensively discussed in *Braiden v. Mercer*, 44 O. St., 339. This was an action upon a guardian's bond for the recovery of the amount found due his wards upon a final settlement and order of the guardian's account in the probate court. The sureties on the bond contended that they were not concluded by that settlement; but the court held that, in the absence of fraud or collusion, the judgment of the probate court against the guardian was conclusive evidence against the sureties of the amount owing by him to his wards. Owen, C. J., said: "By their bond the sureties contract with reference to the action of a court, and that their principal will obey its orders and conform to such action. Can they say they are strangers to such proceedings? Upon their principal's failure to obey the orders of the court, there is clearly a breach of the bond. The relation they assume to such court and its action so far makes them privy to the proceedings affecting their principal as to deny to them the right, when called upon to answer for the breach of the bond, to call in question the grounds upon which the court based its action, and to have the same cause retried. We find in our law numerous illustrations of this principle. The sureties in an undertaking in attachment contract to pay the defendant all damages sustained by reason of the attachment if the order prove to have been wrongfully obtained. Has it ever been doubted that the determination by the court in the at-

tachment proceeding that the order was wrongfully obtained concluded the sureties upon that question in an action upon their undertaking? By an undertaking in replevin the sureties contract that their principal will duly prosecute the action and pay all costs and damages which may be awarded against him. Nobody will claim that the award of damages in the replevin suit is not final against the sureties in an action against them upon the undertaking. An undertaking in an injunction proceeding is conditioned to secure the party enjoined the damages he may sustain if it be finally decided that the injunction ought not to have been granted. It has never been supposed that the sureties, in an action against them, could be heard to say that they were strangers to the injunction proceeding, and that the decision of the court that the injunction ought not to have been granted should be disregarded and that question again litigated." *Lothrop v. Southworth*, 5 Mich., 436, was a suit upon an injunction bond conditioned that the applicant for the injunction would pay the defendant all damages he might sustain should it be finally decided that the injunction ought not to have been granted. The surety on the injunction bond contended that as he was not a party to the injunction suit, that he was not concluded by the decree dissolving the injunction; but the court held that the decree was not only conclusive as against the plaintiff in the injunction suit, but upon the surety upon the injunction bond as well. The court said: "The cause was to be litigated by Lothrop; * * * Cleveland [the surety on the injunction bond] could not be heard in court, as he had no interest in the subject of the controversy. He, as an indifferent person, stepped in to the aid of Southworth to enable him to prosecute his action, and undertook that he should abide the judgment of the court. He can, therefore, raise no question as to the correctness of the decree, nor impeach it in this collateral proceeding. If he apprehends any fraudulent collusion between the parties to the decree, his remedy is in chan-

cery for relief against the bond. * * * To hold otherwise would be to introduce a dangerous and novel doctrine into the law of remedies, viz., that when an action is brought upon a bond given for the performance of a decree against principal and surety, the whole subject of the decree must be relitigated, if a defense is set up impeaching it, before a joint recovery can be had. We apprehend that such a rule would make litigation endless." The principle upon which these two cases rests is that the surety on an injunction, replevin, or attachment bond is a privy to the proceeding in which the bond was used; that the surety was aiding and abetting the action, and in that sense a party and bound by the judgment rendered in the proceeding. The same principle was applied by this court in *Turner v. Killian*, 12 Neb., 580; *Pasewalk v. Bollman*, 29 Neb., 519; *Thomas v. Markmann*, 43 Neb., 823.

In order that the litigant should have an attachment the statute requires him to swear that the cause for which he sues is just. Suppose that all the requirements of the statute are complied with except that the affidavit for attachment contains no such averment. The absence of this averment would not render the attachment proceedings void, but merely irregular, and the affidavit for attachment could be amended. (*Struthers v. McDowell*, 5 Neb., 491.) But suppose the attachment is assailed by motion to dissolve because of the absence of this averment from the affidavit and the plaintiff in attachment does not seek to amend and the court discharges the attachment. In the meantime the property of the defendant has been seized and he has been injured, perhaps ruined. Has he no remedy on the bond? If the averment required by the statute had been in the affidavit it would have been rightfully obtained and the surety on the undertaking would have been protected; but as the averment was not there, and as the statute forbade the resort to the attachment remedy without such an averment, the attachment was wrongfully obtained. In the

case supposed, had the court refused to discharge the attachment, because of the absence of such averment, such action of the court would have been equivalent to its judgment that the attachment was rightfully obtained, and that judgment, though erroneous, would not have been void and could not have been called into question in any collateral proceeding; so that it comes to this: That an attachment is rightfully obtained when the facts exist which the law requires must exist in order to authorize a resort to the remedy, and when the plaintiff suing out the attachment has complied with all the provisions of the law; and an attachment is wrongfully obtained when the facts alleged for its issuance do not exist, or when the plaintiff in the attachment has failed to comply with some requirement of the statute to entitle him to an attachment. And whether rightfully or wrongfully obtained is proved by the judgment or order of the court sustaining it or discharging it, so long as such judgment or order remains unsuperseded and unimpeached for collusion or fraud. We reach the conclusion, therefore, that in a suit upon an attachment bond for damages for wrongfully obtaining the attachment that the judgment or order of the court dissolving the attachment is conclusive evidence that the attachment was wrongfully obtained.

2. In the fourth paragraph of the syllabus of this case as reported in 48 Neb., 27, we said: "To maintain an action independently of the statute, and not on the bond, malice in suing out the writ and want of probable cause must be averred and shown;" citing *Palmer v. Keith*, 16 Neb., 91, and *Jones v. Fruin*, 26 Neb., 76. Those cases are not authority for any question involved in this action, as neither of them was a suit upon an attachment bond. It has always been the policy of the law to encourage the citizen to resort to the courts for the redress of his grievances, and in conformity with this policy the rule of law is that one cannot be made liable in damages for using the process of the courts in any action, provided he acted

with probable cause and without malice. This is the doctrine upon which the last two cited cases rest, and we must not be understood from anything said in this opinion as modifying those cases in any particular whatever. This action is not one for malicious attachment. It is not a common-law action, but is an action founded upon a statutory bond. The judgment of the district court should be affirmed.

W. S. RAKER V. STATE OF NEBRASKA.

FILED JANUARY 7, 1897. No. 8216.

1. **Review: BRIEFS.** A question discussed in the brief of counsel, but not raised by any assignment in the petition in error, will not be considered.
2. **Instructions: MISSTATEMENT OF ISSUES.** A material misstatement of the issues in an instruction in a criminal case is error which will not be cured by a correct statement in another instruction.
3. **Libel: CRIMINAL LAW.** A false or malicious publication, in print or writing, which tends to injure the reputation of another person, or to bring him in contempt, hatred, or ridicule, is libelous, and the publisher is amenable to the criminal law.
4. ———: ———: **INSTRUCTIONS: BURDEN OF PROOF.** In a prosecution for criminal libel it is error to so instruct the jury as to cast upon the defendant the burden of establishing that the alleged publication was not libelous.

ERROR to the district court for Douglas county. Tried below before SCOTT, J. *Reversed.*

James Hassett, E. C. Strobe, and W. S. Summers, for plaintiff in error.

A. S. Churchill, Attorney General, and George A. Day, Deputy Attorney General, contra.

NORVAL, J.

W. S. Raker was convicted in the district court of Douglas county of the publication of a criminal libel, and

sentenced to imprisonment in the penitentiary for the period of one year. He has brought the record to this court for review, alleging forty-four grounds for reversal of the judgment pronounced against him, all of which will not be noticed, for the reason that to do so would necessitate our writing a treatise on the law of criminal libel and criminal procedure as well, which task we neither have the time nor inclination to now undertake. This opinion will be confined to a consideration of but a few of the principal questions raised.

The defendant, on March 1, 1895, was the editor and publisher of the *Gretna Reporter*, a weekly newspaper, published in Sarpy county, this state, and in the issue of his paper of the above date appeared the following article of and concerning Job Babbitt, the complaining witness, who was foreman of the grand jury then in session in the city of Omaha: "Job Babbitt, the foreman of the federal grand jury, now in session at Omaha, and also a *de facto* member of the Christian church, is untiring in his efforts to know the facts as well as to listen to the testimony as to the evils existing in the 'Gate City.' Accordingly, one night last week, he, together with a party of his colleagues, took advantage of the absence of his religious associates to visit one of the dives in the burnt district to while away an hour, and see Omaha by gaslight, listen to the entrancing music, but we hope not to cultivate the acquaintance of the sirens that danced attendance on them. At any rate the party were comfortably enjoying a cigar around a table from which the glasses had not yet been removed when our reporter entered. He was naturally somewhat surprised but reasoned that that was part of their business and let it go at that. The object of their business will doubtless be made known when the indictments are returned." The information charges that the defendant in Douglas county, "unlawfully, feloniously, and maliciously contriving and intending to injure, scandalize, and vilify the good name and reputation of one Job Babbitt, and to bring him into hatred and contempt, ridicule, and

disgrace, unlawfully, feloniously, and maliciously did publish a certain false, malicious, and defamatory libel of and concerning the said Job Babbitt in the *Gretna Reporter*, a weekly newspaper printed and published in the town of Gretna, Sarpy county, Nebraska, and having a general circulation, also then published and having a circulation in Douglas county, Nebraska, in a part of which said false, scandalous, malicious, and defamatory libel were and are contained the following false, malicious, scandalous, and libelous words and matters of and concerning the said Job Babbitt, to-wit: [Here follows that portion of the article above set forth, commencing with 'accordingly one night last week' and ending with 'danced attendance on them,' together with the innuendoes set out in the information.]” A demurrer to the information was overruled by the trial court, which decision is the first ground of complaint in the brief filed. This point cannot be considered, for the reason the ruling on the demurrer is not made the basis of any one of the assignments in the petition in error.

Objection is made to the first instruction by the court on its own motion, which undertook to state to the jury all the material averments contained in the information, but was not wholly successful in that regard. The jury were told, *inter alia*, the information charged that the alleged libelous article was published “in the *Gretna Reporter*, a weekly newspaper printed and published in the town of Gretna, Sarpy county, Nebraska, and having a general circulation in Douglas county.” It is the quoted portion of the instruction which the defendant assails, and the criticism directed against it is well merited. The information contained no averment to the effect that the *Gretna Reporter* was a newspaper of general circulation in Douglas county, yet the jury were told by the first instruction that it did so allege, while the eighteenth paragraph of the charge advised the jury that the information stated that the paper “in which the alleged libel was published by the defendant was a newspaper having a

general circulation," not limiting it to any county, and that the publication of a false and malicious libel in a newspaper having a general circulation constitutes a felony punishable by imprisonment in the penitentiary; but if the paper did not have such a circulation, the publication of such an article therein would not be libel, but misdemeanor merely. The different parts of the charge were contradictory and conflicting upon the question of the character of the circulation of the paper, and tended to confuse and mislead the jury in their deliberations. If the *Gretna Reporter* merely had a general circulation in one county, as the court by the first instruction so directed the jury was the allegation of the information, then, under the decision in *Koen v. State*, 35 Neb., 676, no felony was charged against the accused, but at most a misdemeanor. The jurors may have believed that the defendant was being tried alone for the lesser offense, and hence misled, to return a verdict of guilty as set forth in the information, which charged the highest grade of criminal libel known in this state. The attorney general, in his brief filed, concedes that the instruction was bad, and that if the charge contained no other direction upon the question of the circulation of the *Gretna Reporter*, the conviction could not stand; but he insists that the charge of the court must be construed as a whole, and when thus considered, if it fully and fairly stated the issues, there is no error. Such is undoubtedly the doctrine recognized by this court, but this rule applied to this case will not cure the error in the first instruction. If it had merely failed to state some allegation contained in the information, this defect would have been rendered harmless if the omission was covered by some other portion of the charge of the court. The vice imputed to the first instruction is not that it merely omitted to state something, but that it misstated the averment of the information as to the circulation of the paper containing the alleged libelous article; and such error is not cured by the correct statement concerning the subject in another

paragraph of the charge. (*Ballard v. State*, 19 Neb., 609; *Galloway v. Hicks*, 26 Neb., 531.)

Complaint is made of the giving of the third instruction, which reads as follows:

"3. A libel is a false and malicious publication expressed either in print or in writing, or by pictures, effigies, or other signs, tending to injure the reputation of one alive and expose him to public hatred, contempt, or ridicule. It will be observed that in order to constitute the false and malicious publication, the print or writing need not in fact injure the reputation, nor in fact expose him to public hatred, contempt, or ridicule. It is sufficient if it tends to injure the reputation of the person, and tends to expose him to public hatred, contempt, or ridicule. Nor is the state required to prove, in order to prove a libel, that the false and malicious publication tends to injure the reputation of the person and expose him to public hatred, contempt, and ridicule. It is sufficient if the publication of the matter, either in print or writing, tends to injure the reputation of a person and expose him to public hatred or expose him to contempt or to expose him to public ridicule."

The criticism is directed against the portion of the instruction which says, "nor is the state required to prove, in order to prove a libel, that the false and malicious publication tends to injure the reputation of a person and expose him to public hatred, contempt, and ridicule." It is argued that by this language the burden was cast upon the defendant to prove that the portion of the article made the basis of the prosecution was not libelous. Conceding, without deciding the point, the language just quoted would be a correct statement of the law when applied to a false and malicious publication of an article which on its face discloses that it tends to injure the reputation of a particular person or to cause his social degradation, or to excite public distrust, contempt, or hatred for him, such rule was not appropriate in this case, since the part of the

article set out in the information does not import defamation on its face of a particular person. It does not even mention the name of the complaining witness, and standing alone, and disconnected with the remainder of the article, required proper inducement, innuendoes, and evidence to make it apply to Job Babbitt, and also to show the words were employed in a libelous sense. It was therefore for the state to prove that the publication tended to injure the complaining witness, or to expose him to public hatred or contempt, which fact, if it be a fact, was the province of the jury to determine from all the evidence in the case under proper instructions. It was not for the defendant to show the article was not libelous, but the burden was upon the state to establish every element of the offense.

It is insisted that the court erred in the fifth paragraph of its charge, which was to the effect that the publication of a false and malicious libel of and concerning a person, either in print or in writing, which tends to injure the estimation in which one is held and to injure his good name and to cause him to be despised and to be treated with contempt, constitutes a criminal libel within the meaning of the law. The point is made that the foregoing definition of libel is correct from the standpoint of civil liability, but that criminal prosecutions can only follow a public wrong, and that a publication must be of such a nature as tends to create a breach of the peace and to disturb the harmony of society, else it is not made the basis of criminal prosecution. In Moore's Criminal Law, section 724, it is said: "An indictment lies for publishing words which contained that sort of imputation which is calculated to vilify a man and bring him into hatred, contempt, or ridicule, though the words impute no punishable crime." In 2 Wharton's Criminal Law [10th ed.], section 1595, it is stated that "it is defamatory to publish that of another which will put him, supposing him to obey the impulses common to men under such circumstances, in a condition of mind which is likely to result in a breach

of the peace. And even supposing there be no danger of any such action on his part, it is defamatory to expose him to public hatred, contempt, or ridicule." The same author at section 1598 uses this language: "Whatever, if made the subject of a civil action, would be considered libelous, without laying special damage, is indictable in a criminal court, and by this test, therefore, the law of libel, as expressed in actions for damages, is brought to bear on criminal prosecutions." In *State v. Spear*, 13 R. L., 324, it was ruled that "a publication is libelous if, without charging an indictable offense, it falsely and maliciously imputes conduct tending to injure reputation, to cause social degradation, or to excite public distrust, or hatred." To the same effect are *Giles v. State*, 6 Ga., 276; *State v. Mayberry*, 33 Kan., 441; *State v. Jeandell*, 5 Harr. [Del.], 475; 13 Am. & Eng. Ency. of Law, 294, and the numerous cases cited in note 1. Applying the doctrines of the foregoing authorities to the question under consideration, the definition of libel as laid down by the court in the instruction under consideration is not faulty, but entirely sound.

The sixth instruction is criticised as being argumentative. After defining slander and libel it says: "The words of the slanderer may arouse anger, resentment, and revenge to-day; but they, like all human utterances, lose their potency, their vehemence, their power of producing anger, resentment, and revenge. Ere the end of the morrow they die, young and soon forgotten. Not so when those words are reduced to writing or print and published. They live on and on, and are read by the children and children's children to the last generation of the person libeled. They arise in all their hideous deformity to vex, sap, and destroy the happiness, the peace, the good names of the living and beloved memory of the dead while time lasts, because the ink that prints a published libel never fades, never dies." Argumentative instructions should not be given. Whether the language above quoted is faulty in that regard we shall not stop to decide,

but pass it with the observation that it, as well as other portions of the charge, very clearly, if not quite, invaded the province of the jury.

For the errors indicated the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

LEROY S. WINTERS, APPELLEE, v. JOHN L. MEANS,
APPELLANT.

FILED JANUARY 7, 1897. No. 6411.

1. **Partnership: DESCRIPTION OF MEMBERS: PARTIES.** The description of the individual members of a defendant partnership firm does not make such individuals defendants, the reference to them being merely *descriptio personæ*.
2. **Bill of Exceptions: EVIDENCE OF AUTHENTICATION.** Where there is satisfactory evidence that there had been a proper authentication of a bill of exceptions attached thereto, which, by accident, had become detached and lost, such showing was held sufficient secondary evidence to justify consideration of the bill of exceptions as such.
3. **Partnership: PLEADING: APPEARANCE: LIMITATION OF ACTIONS.** In an action under section 27, Code of Civil Procedure, to charge the property of an individual member of a firm with the payment of a judgment against it, an entry of appearance by the firm, whereby jurisdiction was conferred to render such judgment, and the failure to interpose the statute of limitations as a defense, conclude the individual as to the binding force of such judgment with respect to the objection indicated.

REHEARING of case reported in 48 Neb., 333. *Judgment below reversed.*

O. A. Abbott, for appellant.

B. F. Smith, *contra*.

RYAN, C.

In this case there was filed an opinion directing the affirmance of the judgment of the district court of Adams county. The evidence was not examined on that occasion, for the reason that it was not embodied in an authenticated bill of exceptions. (*Winters v. Means*, 48 Neb., 333.) Subsequently a satisfactory showing was made that before the cause was submitted there had been attached to the alleged bill of exceptions such authentication as entitled it to be considered, but that in some unaccountable manner this evidence had become detached. This, as secondary evidence, was deemed satisfactory within the rule recognized in *Warren v. Brown*, 31 Neb., 8, and accordingly a rehearing was granted. In this opinion we shall resume the history of this case at the point where it was broken off by the discovery that there was no properly authenticated bill of exceptions.

It is now proper to state that in the answer and cross-petition of Means it was alleged that executions had issued from time to time upon the judgment against the firm of W. L. Smith & Co., and that the same had been returned unsatisfied for want of property wherewith to satisfy the same. As we view it, this pleading, after the dismissal of the petition of Leroy S. Winters by himself, stood as a petition for affirmative relief against a partner made sole defendant by his own procurement. This being true, Winters could not be heard to complain that the other members of said firm had not been joined as defendants with him. The pleading disclosed the rendition of the judgment against the firm of W. L. Smith & Co. and the insufficiency of the partnership property to satisfy the same. The prayer was that execution might be issued against Leroy S. Winters, according to the statute in such cases made and provided, and for such other further and different relief as might be agreeable to equity and good conscience. By these averments, under the circumstances of this case, and by the prayer noted,

there was a sufficient compliance with the requirements of section 27, Code of Civil Procedure, to entitle Means to relief in accordance with the provisions of said section, provided Winters was a member of the firm and was bound by the judgment against it. It is proper to state, even at the risk of repeating what may have already been said in some former opinion, that the action instituted by Means against the firm of W. L. Smith & Co., with other defendants, as to whom there was subsequently a dismissal, was for the recovery of judgment in the sum of \$15,000, and interest thereon from July 11, 1874, on account of labor performed and materials furnished in the construction of a certain railroad bridge, pursuant to the terms of a written contract between Means and said firm. It was alleged in the petition of Means that this labor was done and material furnished between the date of the contract, which was May 2, 1874, and July 11, 1874, inclusive of the last named day. This petition was filed on July 8, 1878. After it had been filed there were filed in succession, with the leave of the court, two amended petitions, but as there was no matter in either requiring special attention, we shall forbear describing these two pleadings. On June 22, 1880, there was a judgment in favor of Means in the sum of \$22,691. It will be necessary to consider the record of the entry of this judgment in the course of this discussion, and at that time the particular matters to which attention should be directed will be described.

We shall now consider the objections urged by Winters to the granting of the relief prayed in the case at bar. In the original and amended petitions of Means the firm against which judgment was sought was described as "W. L. Smith & Co., consisting of William L. Smith, John J. Worswick, Leroy S. Winters, Charles Wells, and Henry P. Handy." In this language there was really named but one defendant—W. L. Smith & Co. The quoted language which followed the name of said firm was descriptive of its membership, and did not imply that these indi-

viduals were defendants. As this was an unincorporated association, formed for the purpose of doing business in this state, it was unnecessary, under the provisions of section 24, Code of Civil Procedure, to name the individuals composing it. This particularity in describing the firm was mere surplusage, and as such must be ignored. As a reason why, in this case, the judgment of Means against W. L. Smith & Co. should not be enforced against himself as a member thereof, Winters alleged that no service of summons had ever been made on W. L. Smith & Co., that said firm had never appeared, and that the district court never had obtained jurisdiction of said firm. On November 25, 1879, there was in the case of Means against W. L. Smith & Co. the following proceedings, as shown by the journal entry of said district court: "Come now the defendants and in open court present their motion for leave to answer said amended petition, which is also by the court sustained, and leave is hereby given said defendants to answer thereto within sixty (60) days," etc. In the same cause, under date of June 22, 1880, default was entered, the journal in that connection reciting that the defendants had appeared by attorney on November 25, 1879, asking leave to answer, which was then granted, and had then failed to plead, answer, or demur. It is true that this judgment was afterward reversed in this court, but that fact in no way invalidates the general appearance by the firm of W. L. Smith & Co. It is possible, as contended, that the use of the word "defendants" may have been because the members of the firm were regarded as being defendants, but this assumption, as already stated, was unwarranted. The record quoted shows that there was a general appearance for the firm, and whether or not originally there was proper service of summons is thereby rendered immaterial.

The second contention made by the reply of Winters was that he was not a member of the firm of W. L. Smith & Co. at the time the cause of action accrued upon which suit was brought, but had previously severed his connec-

tion with that firm, as was well known to Means, with whose knowledge and consent, before Means had done anything under his contract, the interest of Winters had been transferred to John J. Worswick, by whom all liabilities of Winters had been assumed. On the trial of this case Mr. Winters testified that he had sold his interest in the firm of W. L. Smith & Co. to his partner, Worswick, on June 5, 1874, but there was no attempt to show that this transfer was known, much less assented to, by Means. When the contract was made Mr. Worswick was one of its members, and the assumption of the responsibility of Winters by Worswick could merely operate to release Winters, for already Worswick, as partner, was personally liable for the entire indebtedness of the firm, and the alleged transfer to him of the liability of Winters added nothing to the assurance of payment to Means. Under this condition of the proofs, Mr. Means testified that he never knew that Winters claimed to have severed his connection with the firm of W. L. Smith & Co. until this action was begun by Winters. Under these circumstances there was not sufficient evidence to justify an assumption that Means assented to the withdrawal of Winters from the firm of W. L. Smith & Co., and to his release from liability as a member of said firm with respect to its existing contract obligations.

It was finally insisted by Winters that more than four years had elapsed after the cause of action had accrued in favor of Means before summons was served on the firm of W. L. Smith & Co., and more than five years had elapsed before an appearance was entered by said firm. This was an attempt to impeach the judgment by pleading matter which might have constituted a defense if, at proper time, it had been interposed as such by the firm of W. L. Smith & Co. This was not done, and thereby there was waived the benefit of the statute personal to the defendant. (*Taylor v. Courtney*, 15 Neb., 190; *Atchison & N. R. Co. v. Miller*, 16 Neb., 661; *Scroggin v. National Lumber Co.*, 41 Neb., 195.)

Brotherton v. Manhattan Beach Improvement Co.

This disposes of all the objections urged in the reply of Winters, and our conclusion is that Means was entitled to the relief prayed in his answer and cross-petition. The judgment of the district court is reversed and this cause is remanded with instructions to enter a decree accordingly.

REVERSED AND REMANDED.

RAGAN, C., having been of counsel, took no part in the determination of this case.

ABIGAIL A. BROTHERTON, ADMINISTRATRIX, v. MANHATTAN BEACH IMPROVEMENT COMPANY.

FILED JANUARY 7, 1897. No. 6639.

Bath-House Companies: NEGLIGENCE: DAMAGES. The conclusions reached in the former opinion in this case considered and adhered to on rehearing.

REHEARING of case reported in 48 Neb., 563. *Judgment below reversed.*

B. G. Burbank, for plaintiff in error.

Gregory, Day & Day, contra.

RYAN, C.

There has been filed in this case an opinion, which was reported in 48 Neb., 563. A rehearing was afterward granted, and from this it results that it has again been presented for our further consideration. It is unnecessary to restate the facts involved, for they were very fully and accurately stated in the opinion above mentioned.

Counsel for the defendant in error, in their brief for rehearing, say there is only one point to which they wish to invite attention, and this they state in the following

language: "It seems to us clear that the court overlooked the fact that the plaintiff's testimony failed to establish that the deceased was accidentally drowned under such conditions that the jury could have found, from the facts of the case, that in the exercise of ordinary diligence the defendant could have prevented the death complained of. The second ground in the motion brings up substantially, if not the same question, a question germane to this." After stating the substance of the holding in *Cooper v. Central R. Co. of Iowa*, 44 Ia., 134, the language of the aforesaid brief was as follows: "That is to say, that no liability for negligence can be charged to a party unless he could have been shown, or it could have been presumed from what was shown, that in the exercise of reasonable care he could have prevented the injury complained of. On page 19 of the transcript N. M. Campion testified of missing the deceased, and the facts to which he testified with reference to the same disclose all that was known of the alleged drowning. What we contend for is that nobody could have known the locality where the body could have been found had it been required of the defendant to have had a man in a boat watching for the deceased to prevent accident. There is nothing to show that the utmost diligence which the defendant could so use in that respect would have enabled the recovery of the body in time to have secured resuscitation. That is to say, that in going down under the water, whether he did it by plunging or by sinking, whether by struggling under the surface he had moved at a distance from where he disappeared of eight, ten, or fifteen feet, rests absolutely on conjecture. Now, before the jury could be satisfied in law in finding for the plaintiff, it must have been made to appear that in the exercise of reasonable care the body of the deceased could have been recovered and resuscitation produced." This extended quotation, which summarizes the contentions on behalf of the defendant in error, presents one general proposition, and that is that there was no evidence from which the jury

would have been justified in finding that by the exercise of ordinary diligence the defendant could have prevented the death complained of. The application of this principle was limited to the possibility of finding the body before life is extinct, and thereupon producing resuscitation. This, standing alone, was not the proposition of special importance in the opinion heretofore filed. A very careful re-examination of all the evidence has convinced us that no fairer summary of the salient features of this case can be formulated than is contained in the said opinion, and, acting on the principle of letting well enough alone, we reproduce the following language: "It is disclosed that the company kept at the beach a boat for the express purpose of use in case of accident to bathers. But there does not seem to have been any one whose duty it was to watch over the bathers or to rescue those in danger. In this case notice was brought home to an agent of the company, close to the shore, that a bather was missing, by Campion's inquiry upon entering the bath house. Campion says he told this man that he was unable to find Brotherton two minutes from the time he left the latter. Campion may have mistaken the time. But we have evidence other than his own estimate. From the testimony as to the depth of the water, coupled with the testimony of Campion that when he last saw Brotherton they were standing in water knee deep, it would seem that Brotherton must have proceeded out into the lake about seventy-five feet before he got beyond his depth. Campion must then have been on the way to the bath house. Assuming Campion's testimony to be true, the proof rises to a moral certainty that when Campion first discovered Brotherton's absence the latter could not have been dead. Assuming again the truth of Campion's testimony, instead of at once taking measures to search for Brotherton in the water, where he was last seen and where the danger existed, no search whatever was made by the company, and their direction to Campion was to search on the shore, where no danger was to be appre-

hended. We think that it is a reasonable inference that persons of ordinary prudence conducting a bathing resort frequented by 10,000 people a month should, in the exercise of ordinary care, keep someone on duty to supervise bathers and rescue any apparently in danger; and, if not, that it is certainly a reasonable inference that persons so situated should, on ascertaining that a person last seen in the water is missing, without a moment's delay, exert every effort to search for that person in the water, and not merely advise a youthful companion of the missing person to search on the land, and coolly watch the result of such search. We think in this aspect of the case, and this only, the evidence presented an issue which should have been submitted to the jury, and for that reason the peremptory instruction was erroneous." (*Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb., 563.) From this quotation it will be seen that our former conclusion was not reached alone upon the assumption that the negligence of the defendant consisted in failing to find the body of Brotherton before life was extinct and producing resuscitation. The testimony, which might have justified a finding of negligence, tended to establish the fact that the company was informed soon enough after Brotherton's disappearance to have assisted him, perhaps before he sank, if proper means had been at once taken. Another fact proper to be taken into account by the jury was that there was no one at the bathing place charged with the duty of giving timely assistance to bathers in case of accident. It seems to be assumed by the argument of the defendant in error that immediately upon Brotherton's being missed, there remained nothing to be done but to look for his submerged body. If this assumption is correct, it quite conclusively implies that necessary relief, to be effective, must be rendered as soon as the bather is seen to be in trouble. The evidence shows that the defendant invited everyone to partake of its privileges, without regard to his or her ability to swim. It was, therefore, to be reasonably expected that among

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10,000 monthly patrons there would be some without skill or experience. It must be admitted that in case an unskillful swimmer was about to drown, tardy aid would probably be unavailing. It therefore seems to us that a jury would have been justified in finding, in respect to Brotherton, that the failure to provide a watcher in advance to prevent such accidents, and, upon timely information of existing imminent danger to him, to neglect attempting to afford him immediate assistance was negligence on the part of the defendant. In *Dinnihan v. Lake Ontario Beach Improvement Co.*, 8 App. Div., 509, 40 N. Y. Supp., 764, it was held that one who maintains a public bathing beach must be vigilant in keeping the premises safe for his customers, and that he cannot escape liability merely by showing that he has done nothing to render the premises unsafe. In the case just cited the improvement company offered a bathing place for the use of the general public for a small consideration, and the deceased, while availing herself of the privilege, was drowned in deep water caused by a depression in the bottom of the lake, which defendant claimed to have been recently formed by a current in the water. The principle above stated, as applied to the facts, was very analogous to that which we recognize as applicable to the facts of this case. We are satisfied that our former conclusion was correct, and accordingly the judgment of the district court is

REVERSED.

BENJAMIN ROSENTHAL ET AL. V. CHARLES OGDEN ET AL.

FILED JANUARY 7, 1897. No. 6858.

1. **Contracts: CONSTRUCTION: QUESTIONS OF FACT.** If a written contract is to be construed with reference to its terms alone, it is the duty of the court to interpret it; but if the construction or application must depend upon other and extrinsic facts, the contract, in

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connection with these questions of fact, should be submitted to the jury, under proper instructions.

2. Trial: EXCEPTIONS: WAIVER. An exception, well taken, to the exclusion of evidence is not waived by a failure to present the same ground of objection by an exception to an instruction given or refused.

ERROR from the district court of Douglas county. Tried below before AMBROSE, J. *Reversed.*

Schomp & Corson and G. M. Lambertson, for plaintiffs in error.

References: *Barnes v. Newcomb*, 89 N. Y., 115; *Attaway v. Third Nat. Bank*, 10 West. Rep. [Mo.], 412; *Atlee v. Fink*, 75 Mo., 100; *Bent v. Priest*, 86 Mo., 476, 1 West. Rep., 749; *Bliss v. Matteson*, 45 N. Y., 22; *Tobey v. Robinson*, 99 Ill., 223; *Harrington v. Victoria Dock Co.*, 47 L. J., n. s. [Eng.], 594; *Bowman v. Phillips*, 3 L. R. A. [Kan.], 631; *Tyler v. Larimore*, 2 West. Rep. [Mo.], 177; *Suits v. Taylor*, 2 West. Rep. [Mo.], 579; *Gray v. Hook*, 4 Comst. [N. Y.], 449; *Gregg v. Wyman*, 58 Mass., 322; *Herrick v. Catley*, 1 Daily [N. Y.], 512; *Sherwood v. Saratoga & W. R. Co.*, 15 Barb. [N. Y.], 650; *Valentine v. Stewart*, 15 Cal., 387; *Gooch v. Peebles*, 11 S. E. Rep. [N. Car.], 421; *Weidckind v. Tuolumne Water Co.*, 5 Am. St. Rep. [Cal.], 445; *In re Cowdery*, 58 Am. Rep. [Cal.], 550; *Spinrad v. Finelite*, 26 N. Y. Supp., 761; *Daniel v. Wilber*, 60 Ill., 526; *Nicholson v. Pelanne*, 14 La. Ann., 514.

Cowin & McHugh and Ogden & West, *contra*.

RYAN, C.

In the district court of Douglas county there was in this case a verdict and judgment in the sum of \$2,123.67 in favor of the plaintiffs in that court. By error proceedings in this court the defendants seek a reversal of this judgment. In describing the history of this case and discussing the principles involved we shall retain the designation of the parties as above given.

Plaintiffs, Charles Ogden and Joel W. West, in their amended petition in the district court, alleged that, as partners, they were engaged in business as attorneys and counselors at law in Omaha; that about September 12, 1892, the defendants employed plaintiffs as their attorneys in a matter in controversy between said defendants and one Samuel Rosenthal; that from said date of employment until December 1, 1892, the said defendants, and each of them, consulted with plaintiffs with reference to said controversy; that on September 28, 1892, Samuel Rosenthal applied to one of the judges of the United States circuit court of appeals for an order of injunction and an application for a receiver against the People's Mammoth Installment House, in which suit the defendants herein were joined as defendants; that at the special instance and request of said defendants, plaintiffs performed all the professional services in and on behalf of said suit as attorneys for the said Benjamin and Maurice Rosenthal, at Omaha, between June 1 and December 1, 1892, to-wit, on or about the — day of June, — day of July, — day of August, 14th, 26th, and 30th days of September, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, and 19th days of October, and the — day of November, 1892. It was alleged by plaintiffs that the professional services rendered by them were well worth the sum of \$2,500, and that no part thereof had been paid, but that the full amount of \$2,500 was still due. There was a prayer for judgment in the above sum. The defendants, in their answer, alleged that the People's Mammoth Installment Company, referred to in the petition, was a corporation in which Samuel Rosenthal and the defendants were the sole stockholders; that Benjamin Rosenthal was its president and that Maurice Rosenthal was an agent of said corporation; that about May 2, 1892, Charles Ogden, one of the plaintiffs, and the People's Mammoth Installment Company entered into a written agreement, of which the following is a copy:

“This agreement, entered into by and between Charles

Ogden of the first part and the People's Mammoth Installment Company of the second part, witnesseth: That for and in consideration of the sum of \$300, to be paid by the said second parties, or either of them, to the said first party, the said first party agrees to do all the law business as attorney and counselor at law for the said second parties for a period commencing on the first of May, A. D. 1892, and terminating on the first day of May, 1893. It is agreed that said amount shall be paid in equal installments of seventy-five dollars (\$75.00) every three months included in said period, and that this contract is considered to be one of entirety, and that in consideration of said first party doing all of said legal work for said second parties at such reduced rate, that the whole of said sum shall be considered earned during any period of said agreement should said parties of the second part fail to perform any of the covenants by them to be performed herein, or should they, or either of them, desire to abrogate this contract. In witness whereof, we have hereunto set our hands this second day of May, A. D. 1892.

"CHARLES OGDEN."

It was alleged in the answer that the existence of the above contract was known to Mr. West, of the firm of Ogden & West, during the time set forth in the petition, and that said corporation and the defendant, as its president and agent, and either of them, during said time, did not employ said firm of Ogden & West to transact any law business for them, or any one of them. Following the above described averments in the answer was this language: "These defendants further show that the legal services and consultations set forth in said petition, and sued on therein as the services of Ogden & West, were rendered in and about a suit wherein Samuel Rosenthal was named as plaintiff and the People's Mammoth Installment Company, together with these defendants, were named as defendants, and were such legal services as said Ogden was bound to render and perform under and by virtue of such contract of service, and not such

as these defendants, or either of them in their individual capacities, promised to pay or become liable for. And these defendants further show that if said West, or said alleged firm of Ogden & West, performed any service in and about said suit as set forth in said petition herein, he and said alleged firm did so at the request and instance of said Ogden, and for said Ogden, and because of his, said Ogden's, obligation to perform the same under his said contract of service as aforesaid, and not at the instance and request of these defendants, or either of them." There was a reply in denial of each allegation of new matter in the answer. In support of the above matters pleaded in the answer the defendants offered in evidence the above described written contract, to which an objection was interposed because of the contract as evidence being incompetent, irrelevant, and immaterial. Thereupon counsel for plaintiffs stated that they made no claim for services against the defendants in this case under said written contract with respect to the matters involved in the bill of complaint in the United States court and services with reference thereto, whereupon the contract was excluded and the defendants excepted. In regard to this ruling we find in the brief of counsel for the parties in whose favor it was made the following suggestion, by way of argument: "The construction of the legal effect of a contract belongs to a court, and the admission of the same in a case like this would have tended to mislead the jury and confuse them as to the relative rights of the parties to the controversy. It would have been impossible for the jury to draw the distinction between the personal rights of stockholders in a trading corporation and those in a corporation *per se*. Further, the instruction of the court which embodied the law of the case, and which superseded the ruling of the court in withholding the contract from the jury, was not excepted to. Every instruction was read to the jury with full approval of counsel for plaintiffs in error. It will be observed, however, that when the defendants of-

ferred the contract in evidence, counsel for the plaintiffs expressly stated that no claim, of whatsoever nature, was made by reason of the existence of said contract—the whole claim of plaintiff being based upon the question as to whether a new and independent agreement had been made by defendants to represent them in their suit and controversy against their brother Samuel.” This argument involves three propositions, which shall now receive consideration.

It is argued that as there were involved the personal rights of stockholders, and the rights of the corporation as such, it would have been impossible for the jury to draw the proper distinction, therefore (proposition 1) the construction of the legal effect of the contract belonged to the court. In *Coquillard v. Hovey*, 23 Neb., 622, it was said: “As we understand the rule for the construction of contracts, it is that if a contract is to be construed by reference to its terms alone, and without calling in the aid of extrinsic facts and circumstances, it is the duty of the court to interpret it. But if the construction must depend upon proof of other and extrinsic facts, then those questions of fact should be submitted to the jury, under proper instructions from the court. (*Begg v. Forbes*, 30 Eng. Law & Eq., 508; *Etting v. United States Bank*, 11 Wheat. [U. S.], 74; *First Nat. Bank of Springfield, Illinois, v. Dana*, 79 N. Y., 108; *Edelman v. Yeasel*, 27 Pa. St., 26.” The province of the court with reference to the construction of contracts is sufficiently indicated by the above language, and the principle involved was recognized in *Rosewater v. Hoffman*, 24 Neb., 222, and again invoked in *Simms v. Summers*, 39 Neb., 781. The theory of plaintiffs was that they were specially employed by the Rosenthals independently of the above written contract, and solely under that employment they were entitled to compensation. The defense was that there was no such special employment, but that the services were rendered for the company pursuant to the provisions of said written contract, and that whatever was done for the Rosenthals

was merely incidental to the main controversy with their principal. It was proper to permit plaintiffs to introduce proofs conformably to the averments of their petition, but upon this being done, there was no good reason for shutting out all evidence in support of a defense specially pleaded.

In the presentation of proofs by defendants it was necessary to introduce the written contract, for it was the best evidence that one of the plaintiffs had been employed by the People's Mammoth Installment Company to render services of the same character as these for which compensation was claimed, during the period within which they were rendered and for a stipulated compensation much less than that sued for. The fact that this evidence might require to be supplemented with testimony that there was no other or further employment rendered it none the less competent. Without the written contract, the testimony that there was no employment other than was provided in said written contract would have fallen far short of establishing the defense pleaded. It was, therefore, not a question of the interpretation of this written agreement by reference to its own terms alone, without calling in the aid of extrinsic facts and circumstances, but the construction and application were dependent upon proof of other and extrinsic facts, therefore the written contract should have been submitted to the jury, in connection with other competent evidence, under the instructions of the court.

Counsel for Ogden & West seek to avoid the force of this reasoning by observing that at any rate there was no exception to the instruction given which embodied the law of the case. The exclusion of the written contract left the defense so necessarily incomplete that exceptions to instructions given or to the refusal to instruct could not supply the deficiency. The failure to take an exception to the giving or refusal of an instruction, therefore, in no way operated to waive the exception already well taken as to the ruling in exclusion of the written con-

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tract. It is urged in support of the ruling just mentioned that when the defendants offered the contract in evidence, counsel for plaintiffs expressly stated that no claim, of whatsoever nature, was made by reason of the existence of said contract, and that plaintiffs' claim was based upon a new and independent agreement with the Rosenthals. This statement in no degree modified the already existing issues, for from the first the plaintiffs had disclaimed a right of recovery under this written agreement, and had relied upon a special employment by Benjamin and Maurice Rosenthal as individuals. This written contract was offered as a part of their defense to this claim, and no waiver by plaintiffs could impair its competency or relevancy as such.

For the error pointed out the judgment of the district court is reversed and this cause is remanded for further proceedings, not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

ELISHA P. REYNOLDS ET AL. V. A. D. MCCANDLESS.

FILED JANUARY 7, 1897. No. 6984.

Review Without Bill of Exceptions. The alleged errors in this case being wholly dependent upon the nature of the evidence admitted and excluded, are not available to plaintiffs in error, because of the bill of exceptions having been quashed on motion before the final submission.

ERROR from the district court of Gage county. Tried below before BUSH, J. *Affirmed.*

E. N. Kauffman, for plaintiffs in error.

Samuel J. Tuttle, *contra.*

RYAN, C.

In this case there was in the district court of Gage county a verdict and a judgment in favor of the defendant in error for services as an attorney at law rendered on behalf of the plaintiff in error in the trial of said district court of the case of *Dolan v. McLaughlin*, 46 Neb., 449, and on rehearing again reported in 48 Neb., 842. On motion the bill of exceptions was quashed in this case, and upon examination of the record we find that the instructions criticised embodied propositions of law abstractly correct. Whether or not in view of the evidence they should have been given we cannot say, for there is no means of ascertaining what the evidence was in the absence of a bill of exceptions. This same consideration prevents an examination of the alleged error in the exclusion of evidence tendered by the plaintiff in error. The judgment of the district court is

AFFIRMED.

FRANK LISY V. STATE OF NEBRASKA, EX REL. ANNA
DUFEK.

FILED JANUARY 7, 1897. No. 8459.

Bastardy: EVIDENCE OF OFFER OF MARRIAGE. In a bastardy action it is prejudicial error to admit in evidence, over proper objections, an offer of marriage by the putative father to the mother of the bastard child, made with a view to the settlement of such proceedings about to be commenced.

ERROR from the district court of Butler county. Tried below before BATES, J. *Reversed.*

L. S. Hastings, for plaintiff in error.

Matt Miller and *W. M. Cain*, *contra.*

RYAN, C.

Plaintiff in error, in the district court of Butler county, was found guilty upon the charge of being the father of a bastard child of which Anna Dufek, an unmarried woman, was the mother. To reverse the judgment requiring the payment of the aggregate amount of \$1,000 and in default of such payment that plaintiff in error be imprisoned in the county jail, these error proceedings are prosecuted.

On the trial there was introduced evidence, over proper objections of the plaintiff in error, to the effect that Mr. Lisy, in view of the bastardy proceedings about to be commenced, had offered to settle with the mother of the child aforesaid by marrying her, and that this offer had been met with a proposition on the part of Anna Dufek that she would marry plaintiff in error if certain land was by him conveyed to her as an earnest that he would not desert her. It has been held that it is prejudicially erroneous to admit testimony of this character when properly objected to. (*Olson v. Peterson*, 33 Neb., 358; *Robb v. Hewitt*, 39 Neb., 217.) For the error indicated the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

NETTIE PECK V. NEBRASKA LOAN & TRUST COMPANY.

FILED JANUARY 7, 1897. No. 6976.

Review: TRANSCRIPT: ORIGINAL PLEADINGS. The requirement that there shall be a transcript of the proceedings of the district court filed in the supreme court is not complied with by filing the original pleadings with a certified transcript of the record showing the entry of a judgment; and under such circumstances the judgment sought to be reversed, when found from the transcript to have been within the jurisdiction of district court, will be affirmed.

Peck v. Nebraska Loan & Trust Co.

ERROR from the district court of Adams county. Tried below before BEALL, J. *Affirmed.*

Capps & Stevens and A. W. Agee, for plaintiff in error.

John A. Casto and J. B. Cessna, *contra.*

RYAN, C.

There was in this case a judgment in the district court of Adams county in favor of the plaintiff in error for the sum of \$425.65, and an order requiring that the clerk of said court pay said judgment with an equal amount of money deposited in his hands for that purpose. The transcript of this judgment shows that it was within the jurisdiction of the said court; indeed, plaintiff in error practically admits this, contending, moreover, that it should have been for a greater sum. By stipulation, the parties brought into this court the original pleadings, certified as such by the clerk of the district court, and there is on file no other means of ascertaining what issues were presented and tried in the district court. It has been repeatedly held that the filing of a certified transcript of the pleadings is jurisdictional, and that where the judgment is one within the jurisdiction of the district court, as shown by a transcript thereof, it will be affirmed. (*Moore v. Waterman*, 40 Neb., 498; *Bell v. Beller*, 40 Neb., 501; *School District v. Cooper*, 44 Neb., 714; *Romberg v. Fokken*, 47 Neb., 198.) The judgment of the district court is accordingly

AFFIRMED.

RAGAN, C., having been of counsel, took no part in the consideration of this case.

VILLAGE OF CULBERTSON V. ALEXANDER G. HOLLIDAY.

FILED JANUARY 7, 1897. No. 7605.

1. **Municipal Corporations: DANGEROUS PREMISES: EVIDENCE.** In a suit against a municipal corporation for damages alleged to have been sustained by plaintiff's falling into an unguarded excavation in a lot fronting on a street, a correct plan or drawing of the excavation and the surrounding locality is competent evidence.
2. **Negligence.** The law requires of a person the exercise of care and caution commensurate with the danger confronted, but this rule involves no more than the exercise of ordinary care and prudence in view of the circumstances.
3. —: **ORDINARY CARE.** The law does not require of an old person the exercise of greater care to avoid injury than it requires of a young and vigorous one. It requires of each the exercise of ordinary care. It requires of neither the exercise of extraordinary care.
4. —: **EVIDENCE.** Whether a certain act or omission is or is not evidence of negligence is for the court, but whether such evidence convicts a party of negligence is for the jury.
5. —: **INSTRUCTIONS.** It is error for a court to state to a jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that they amount to negligence. *Missouri P. R. Co. v. Baier*, 37 Neb., 253, followed.
6. —: —. Such expressions as "slight negligence" and "slight want of ordinary care" should not be used in instructions, as they tend to obscure and confuse what should be stated in plain and concise language.
7. —: **PERSONAL INJURIES.** In an action for damages for injuries alleged to have been sustained through the negligence of another, there is no such issue as the slight negligence of any one.
8. —: —. The doctrine of comparative negligence is not in force in this state. Our courts recognize no degrees of negligence. The rule is that if a person himself, in the exercise of ordinary care, is injured through the negligence of another, he may recover; but if his own negligence contributed to or was the proximate cause of the injury he cannot recover.

ERROR from the district court of Hitchcock county.
Tried below before WELTY, J. *Reversed.*

L. H. Blackledge, for plaintiff in error.

William O. Woolman and Cobb & Harvey, contra.

RAGAN, C.

On April 12, 1893, Alexander G. Holliday was conducting a store on the southeast corner of the intersection of Taylor avenue and Wyoming street, in the village of Culbertson. Holliday's residence was a block west and a half block south of his store. At that date there existed an excavation in the lot on the southwest corner of the intersection of said thoroughfares, and immediately west of Holliday's store. This excavation had been made for the purpose of erecting a building on said lot. The night of said day was very dark, and Holliday, then going from his store to his residence, fell into said excavation and was injured. He brought this suit against the village of Culbertson to recover damages for said injury, claiming that he had sustained the same while in the exercise of ordinary care, and through the negligence of the village in failing to protect such excavation by barriers, danger signals, or otherwise. He had a verdict and judgment and the village has brought the same here for review on error.

1. On the trial of the case the court permitted to be given in evidence a diagram, plan, or drawing of the place of the excavation and the surrounding locality. This ruling of the court is assigned for error. A proper foundation was laid for the introduction of this diagram and it was competent evidence.

2. It appeared from Holliday's testimony that prior to falling into the excavation he was aware of its existence. The village requested the court to give an instruction to the jury to the effect that since Holliday was aware of the excavation prior to his injury, that in attempting to pass along the street by the excavation it was incumbent upon him to use extraordinary care and precaution, and unless he did so he could not recover. The district court refused to give this and instructed the jury, in effect, that

Holliday was not required, in attempting to pass along the street by the excavation, to exercise the highest possible degree of caution, and that it was sufficient if he exercised reasonable and ordinary care and caution under the circumstances of the case. This action of the court, it is claimed, is erroneous. We do not think it was. It is true that the law requires of a person that he shall exercise care and caution commensurate with the danger confronted, but this is only exercising ordinary care and prudence in view of the circumstances. In *City of Beatrice v. Reid*, 41 Neb., 214, it was held that "if one attempts to pass over a place of danger, the law requires him to exercise caution commensurate with the obvious peril; but this means that the law only requires of the party to exercise ordinary care, the danger and his knowledge thereof considered." And here we remark that the defendant in error was a man seventy-seven years of age, and the court, at the request of the village, instructed the jury as follows: "You are instructed that a person far advanced in years and feeble is bound to use greater care in avoiding defects and dangers such as the excavation testified about than a young and vigorous person." This instruction was wrong, all wrong. The law does not require an old person to exercise greater care to avoid injury than it requires of a young and vigorous one. It requires of each the exercise of ordinary care.

3. The third assignment of error is that the court erred in refusing to give an instruction asked by the village to the effect that it was not an insurer against accidents upon its streets, and the mere fact that Holliday fell into the excavation and was injured would not enable him to recover. The court did not err in refusing to give this instruction, as instruction No. 14, given at the request of the village, told the jury that the fact that Holliday fell into the excavation and was injured was not sufficient to entitle him to recover, unless they should find that his injury was caused by the negligence of the village and that no negligence of Holliday's contributed to such in-

jury. The court was not obliged to tell the jury that the village was not an insurer against accidents upon its streets. No such issue was made in the pleadings and no such a claim made at the trial.

4. It is insisted that the court erred in refusing to give the following instruction: "You are instructed that the mere fact that the defendant village permitted an excavation to be made and exist alongside of or extending a short distance into the highway, for the purpose of the erection of a building, would not of itself constitute negligence." If the village permitted an excavation to be made in one of its public streets, and permitted it to exist there without barriers or danger signals, then these facts were evidence of negligence. Whether a certain act or omission is or is not evidence of negligence is for the court, but whether such evidence convicts a party of negligence is for the jury. (*Spears v. Chicago, B. & Q. R. Co.*, 43 Neb., 720.) By the instruction under consideration, the village requested the court to charge the jury, in effect, that certain acts or omissions did not constitute negligence. The court correctly declined to so charge.

5. Another argument is that the court erred in refusing to give the jury the following instruction: "You are instructed that if you find that the injury complained of by plaintiff was caused by the mutual, concurring negligence or fault of both plaintiff and defendant, then the plaintiff cannot recover." The court had already instructed the jury, in No. 9, at the request of the village, that though there may have been negligence on the part of the village, yet if the plaintiff, by the exercise of reasonable and ordinary care, could have avoided the consequences of such negligence he could not recover. This was all the village was entitled to. The court did not err in refusing to give the instruction requested.

6. The next argument we notice is that the court erred in refusing to give instructions 12, 14, and 17 requested by the village. By these instructions the court was requested to charge the jury, in effect, that if there was no

sidewalk by the excavation, but there was a sidewalk on the opposite side of the street, and that Holliday, knowing these facts, attempted to pass along the south side of the street, by the excavation, on a dark night, that he was guilty of contributory negligence. It is error for a court to state to a jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct the jury that they amount to contributory negligence. The court may tell the jury what act or omission is evidence of negligence or contributory negligence, but it is for the jury to say whether these facts convict the party of negligence. (*Missouri P. R. Co. v. Baier*, 37 Neb., 253; *Omaha Street R. Co. v. Craig*, 39 Neb., 601, and cases there cited.) This has been ruled so many times in this court that we are surprised to find counsel asking the district court to instruct the jury that certain acts or omissions of a litigant constitute negligence on his part. The court correctly refused the instructions.

7. The village requested the court to instruct the jury in effect that if Holliday, knowing of the existence of the excavation and its condition, had passed by the same daily for some time, and knowing that there was no sidewalk along the street in front of such excavation, but there was a sidewalk on the opposite side of the street, chose to go on the south side of the street and by said excavation, that these facts were proper for the jury to consider in determining whether Holliday's conduct, under the circumstances, was negligence. The court refused to give this instruction and, at the request of Holliday, instructed the jury to the effect that Holliday knowing of the excavation, his conduct under the circumstances was not conclusive evidence of negligence. The instruction refused was a correct statement of the law, but since the court told the jury that his conduct was not conclusive evidence of negligence against him, the village was entitled to have the jury instructed that they might take into consideration his knowledge and conduct in deter-

mining whether he had been guilty of negligence. We do not think that it would have been error for the court to have refused the instruction requested if the one requested by the village had not been given.

8. Another argument is that the court erred in refusing to instruct the jury as follows: "You are instructed that if the plaintiff was guilty of any negligence, however slight, which contributed directly to cause the injury complained of he cannot recover." In *Omaha Street R. Co. v. Craig*, 39 Neb., 601, we said that such expressions as "slight negligence" and "slight want of ordinary care" should never be used in instructions to juries, as such expressions tend to obscure and confuse what should be stated in plain and concise language. We adhere to that ruling and accordingly hold that the court did not err in refusing to give the instruction requested. This instruction was copied from *Village of Orleans v. Perry*, 24 Neb., 831. But this court, in that case, did not approve of the instruction. All we did say of the instruction in that case was that the giving it was not prejudicially erroneous. In the case at bar, Holliday was injured; and the inquiry here, as in all other cases of this character, was and is: By whose fault was it that the injury was inflicted? If Holliday himself, while in the exercise of ordinary care, was injured through the fault and the negligence of the village, he is entitled to recover. If the proximate cause of his injury was his own negligence, he is not entitled to recover. There was not and cannot be in such a case any question of the slight negligence of any one.

9. At the request of Holiday, the court instructed the jury that to entitle him to recover "he need not be wholly free from negligence, provided his negligence is but slight and the other party is guilty of gross negligence in comparison therewith as defined in these instructions." A final argument is that the giving of this instruction was error. We think it was. The instruction is an application of the doctrine of comparative negligence, a rule

in force, so far as we know, only in the courts of the state of Illinois. This rule is not, and has never been, in force in this state. There are no degrees of negligence here. The rule here is that if a person, himself in the exercise of ordinary care, is injured through the negligence of another, he may recover; but if his own negligence contributed to, or was the proximate cause of, the injury received, he cannot recover. It is said by counsel for Holliday that this court in *City of Lincoln v. Gillilan*, 18 Neb., 114, and *Village of Orleans v. Perry*, 24 Neb., 831, has approved of the rule involved in the instruction under consideration; but counsel are mistaken. It is true that an instruction very similar to the one here was given in each of those cases, but this court did not approve of the instruction in either of said cases. All that we did say was that if the instruction given in those cases was erroneous, it was error without prejudice to the plaintiff in error. We think that the classification of negligence attempted in the instruction given by the district court is wrong in principle and leads to confusion. (*New York C. R. Co. v. Lockwood*, 84 U. S., 357.) In *McPheters v. Hannibal & St. J. R. Co.*, 45 Mo., 22, the court said: "In law there is no difference between negligence and gross negligence, the latter being nothing more than the former with the addition of a vituperative epithet." In *Wells v. New York C. R. Co.*, 24 N. Y., 181, the court said that the supposed distinction between different degrees of negligence should be discarded as illusory and impracticable. In disapproving of the instruction under consideration, we are not laying down a rule in conflict with those cases which permit a plaintiff to recover for an injury inflicted upon him by the negligence of another where he negligently placed himself in danger. Those cases permit an injured party to recover, notwithstanding that he negligently placed himself in a dangerous situation, because the evidence disclosed the failure of the other party to exercise ordinary care after discovering the injured party's danger. Those cases then are in harmony

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with the rule that we announce here: That to enable the plaintiff to recover the evidence must show that the proximate cause of his injury was the negligence of the defendant, and that at the time he himself was in the exercise of ordinary care; that is, that his going originally into a position of danger was not the proximate cause of the injury he received. Not only did the district court err in giving the instruction under consideration, but we are constrained to say that we think the instruction was prejudicially erroneous. The judgment of the district court is reversed.

REVERSED AND REMANDED.

HARTFORD LIFE & ANNUITY INSURANCE COMPANY V.
JAMES P. CUMMINGS ET AL.

FILED JANUARY 7, 1897. No. 8702.

Interpleader: Insurance: Garnishment: Injunction. The beneficiary of a life insurance policy was indebted to a bank domiciled in Douglas county, Nebraska. The bank sued the beneficiary in Connecticut, in the county of the domicile of the insurance company, and caused the latter to be attached as garnishee. An execution issued on the judgment rendered in this action having been returned unsatisfied, the bank instituted there a *scire facias* proceeding against the insurance company. The insurance company made no appearance to either of these proceedings. Before judgment in the *scire facias*, one Cummings, in said Douglas county, sued the insurance company to recover the amount owing by it on said policy, claiming to be the owner of the same as assignee of the beneficiary. The insurance company appeared in this action, and, before answer, filed an affidavit reciting that the action of Cummings was based upon a contract for the recovery of personal property; that the bank, without collusion with it, made claim to the subject-matter of Cummings' action; that it, the insurance company, was ready to pay the money in its hands as the court might direct, and moved the court for an order requiring the bank to interplead in the action and maintain or relinquish its claim against it, the insurance company. Cummings had not appeared in any of the proceedings had in the Connecticut court, nor had that court any jurisdiction over him. *Held*, (1) Construing section 48 of the Code of Civil Procedure, that the insurance company

was entitled to an order requiring the bank to interplead in the action; (2) to an order permitting it to pay the fund in its hands into the custody of the court, and on so doing to be dismissed from the case and discharged of all liability for that fund, both to Cummings and the bank; (3) that if the insurance company saw fit to remain in the case and defend the action of Cummings, it was entitled to an order enjoining the bank from further prosecuting its *scire facias* proceeding pending in the court of Connecticut until the final determination of the action at bar.

ERROR from the district court of Douglas county.
Tried below before FAWCETT, J. *Reversed.*

The opinion contains a statement of the case.

Warren Switzler, for plaintiff in error:

The facts presented make a proper case for statutory interpleader. (3 Pomeroy, Equity Jurisprudence, secs. 1320, 1329; Rood, Garnishment, sec. 331; *Fitch v. Brower*, 42 N. J. Eq., 300; *Bishop v. Holcomb*, 10 Conn., 444; *Vanbuskirk v. Hartford Fire Ins. Co.*, 14 Conn., 140; *Coleman v. Scott*, 27 Neb., 77; *McWhirter v. Halsted*, 24 Fed. Rep., 828; *City of Atlanta v. McDaniel*, 22 S. E. Rep. [Ga.], 896; *Brock v. Southern R. Co.*, 22 S. E. Rep. [S. Car.], 601; *Crane v. McDonald*, 118 N. Y., 648; *Allen v. Buchanan*, 97 Ala., 399.)

The insurance company should have been allowed to pay the money into court and be dismissed, and the bank should have been enjoined from prosecuting its action in Connecticut. (2 Story, Equity Jurisprudence, sec. 900; 3 Pomeroy, Equity Jurisprudence, secs. 1318, 1320; Reno, Non-Residents, sec. 170; *Dehon v. Foster*, 4 Allen [Mass.], 545; *Cole v. Cunningham*, 133 U. S., 107; *Cunningham v. Butler*, 142 Mass., 47; *Green v. Van Buskirk*, 74 U. S., 139.)

W. W. Morsman, for Omaha National Bank.

References: *Crane v. McDonald*, 23 N. E. Rep. [N. Y.], 991; *Chicago, B. & Q. R. Co. v. Moore*, 31 Neb., 629; Greenhood, Public Policy, p. 500; *Burck v. Taylor*, 152 U. S., 646; *Griggs v. Landis*, 19 N. J. Eq., 351; *Matthias v. Smith*, 13 Neb., 178; *Turner v. Sioux City & P. R. Co.*, 19 Neb., 241; *Wright v. Chicago, B. & Q. R. Co.*, 19 Neb., 176; *American*

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Central Ins. Co., v. Hettler, 37 Neb., 849; *Taylor v. Taintor*, 16 Wall. [U. S.], 370; *Fitzgerald v. Fitzgerald*, 44 Neb., 463; *Prugh v. Portsmouth Savings Bank*, 48 Neb., 414.

John O. Yeiser, for James P. Cummings.

RAGAN, C.

July 24, 1895, Martin M. Marshall died. His life was insured for \$5,000 in the Hartford Life & Annuity Insurance Company, hereinafter called the insurance company. His wife Mary was the beneficiary named in the insurance policy. At the date of her husband's death Mrs. Marshall was indebted to the Omaha National Bank, hereinafter called the bank. August 5, 1895, the bank brought suit in the state of Connecticut, in the county of the domicile of the insurance company, against Mrs. Marshall and caused the insurance company to be attached as garnishee. The insurance company was duly served with process in the attachment and garnishee proceedings, but made no appearance therein. A duly attested copy of the summons and complaint in the proceeding of the bank against Mrs. Marshall was, on August 6, 1895, served on her by leaving the same with the secretary of the insurance company. Mrs. Marshall was not otherwise served with process in the action and made no appearance therein. March 18, 1896, the court in Connecticut rendered judgment that the bank recover of Mrs. Marshall out of the attached money in the hands of the insurance company the sum of \$——. An execution was issued on this judgment and returned March 31, 1896, wholly unsatisfied. Thereupon the bank, in pursuance of the provisions of the statute of Connecticut, instituted a *scire facias* proceeding against the insurance company and prayed for a judgment against it for the amount of the bank's claim against Mrs. Marshall to the extent of the money owing by the insurance company on the insurance policy. Prior to the bank's judgment in attachment against Mrs. Marshall, to-wit, November 18, 1895, James

P. Cummings brought this suit in the district court of Douglas county against the insurance company on the policy issued on the life of Martin M. Marshall, claiming to be the owner of said policy and entitled to collect the \$5,000 due thereon by virtue of an oral assignment thereof to him August 5, 1895, made by Mrs. Marshall. The insurance company was duly summoned in this action, and November 19, 1895, before answering, its attorney filed in the case an affidavit reciting that he was the duly authorized attorney of the insurance company; that the insurance company was a corporation; that the claim of Cummings was based upon a contract for the recovery of personal property; that the bank was a corporation organized under the laws of the state of Nebraska having its principal place of business in said Douglas county, and that the bank, without collusion with the insurance company, made a claim to the subject-matter of the action; that the insurance company was ready to pay the amount claimed upon order of the court,—and thereupon moved the court for an order on the bank to interplead in the action. On the same day the district court made an order that the bank appear on the 30th of December, 1895, and file its answer maintaining its claim to the said sum, the \$5,000 claimed by Cummings from the insurance company, and in default thereof that it relinquish its claim against the insurance company for said sum of money. On the 27th day of November, 1895, the bank appeared in the action and moved the court to require Cummings to give security for costs and on the same date moved the court for an order requiring Cummings to make his petition more definite and certain. April 27, 1896, the bank asked and obtained leave to plead in twenty days. On May 13, 1896, the bank moved the court for an order to suspend further proceedings in the case until the *scire facias* proceedings instituted by it in Connecticut against the insurance company should be finally determined. June 13, 1896, the insurance company moved the court for an order overruling this last

motion made by the bank and for an order, upon its paying the \$5,000 in controversy into court, enjoining the bank from further prosecuting its *scire facias* proceeding pending in Connecticut, and a further order that it, the insurance company, might thereupon be discharged from any further liability as to said fund both to the bank and Cummings. At this time the bank amended its motion to suspend proceedings in the case at bar into a motion to vacate the order made by the court requiring the bank to appear and interplead. The court overruled the motion of the insurance company and sustained the amended motion of the bank and entered a judgment dismissing the bank from the case. At the time Cummings brought this suit, and at the time the bank appeared in the cases in obedience to an order of the court for it to interplead, the court in Connecticut had obtained no jurisdiction over him, if it can be said that it has since obtained such jurisdiction. To reverse the judgment of the district court dismissing the bank from the action the insurance company prosecutes a petition in error here.

It will thus be seen that the insurance company has in its hands \$5,000, money owing by it on the policy issued to Martin M. Marshall. The bank claims this money by virtue of its judgment proceedings against Mrs. Marshall in the court of Connecticut, while Cummings claims it by virtue of an assignment of the policy to him by Mrs. Marshall, the beneficiary thereof. Section 48 of the Code of Civil Procedure is as follows: "Upon the affidavit of a defendant before answer in an action upon contract, or for the recovery of personal property, that some third party, without collusion with him, has or makes a claim to the subject of the action, and that he is ready to pay or dispose of the same, as the court may direct, the court may make an order for the safe keeping, or for the payment, or deposit in court, or delivery of the subject of the action, to such person as it may direct, and an order requiring such third party to appear in a reasonable time

and maintain or relinquish his claim against the defendant. If such third party, being served with a copy of the order by the sheriff, or such other person as the court may direct, fail to appear, the court may declare him barred of all claim in respect to the subject of the action, against the defendant therein. If such third party appear, he shall be allowed to make himself defendant in the action in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of the court for the payment, deposit, or delivery thereof." This statute is a substitute for the chancery rule or remedy of interpleader. The rule was applied on the theory that at law no adequate protection was afforded a defendant sued for a fund or property in his possession and claimed by some person not a party to the suit. But the statute just quoted is broader than the chancery rule. Under the statute a defendant sued for a fund or property in his hands is entitled to an order compelling a third party claiming such fund or property to interplead in the action, even though the defendant might successfully defend the suit, the theory of the statute being to avoid multiplicity of suits, to protect the party holding the fund or property from being put to the costs and expense of defending against claimants for property in his hands which he himself does not claim. Under the chancery rule a party in the possession of a fund or property claimed by two or more parties, before being sued by either of them, might by bill filed for that purpose compel the claimants to come in and set up their claims to the fund or property and on paying the money or delivering the property into the custody of the court be discharged from any further liability to all of said parties for such property or fund. In other words, the fact that the holder of the fund or property was aware of conflicting claims of other parties thereto and was in danger of being sued by said parties enabled such holder to successfully invoke the protection of a court of chan-

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cery. (*Newhall v. Kastens*, 70 Ill., 156; *Richards v. Salter*, 6 Johns. Ch. [N. Y.], 445.) In *McWhirter v. Halsted*, 24 Fed. Rep., 828, the court, speaking of the chancery practice as to interpleaders, said: "The best elementary writers say that an interpleader is properly applied where two or more persons severally claim the same thing under different title or in separate interests from another person, who, not claiming any title or interest therein himself and not knowing to which of the claimants he ought of right to render the debt, is either molested by an action brought against him, or fears that he may suffer injury from the conflicting claims of the parties." In the case at bar the insurance company has been sued by Cummings for the fund in its hands in the courts of this state. The bank is also claiming the fund in the hands of the insurance company in a suit pending in the courts of the state of Connecticut, to which suit Cummings is not a party and over whom the Connecticut court has no jurisdiction. In this suit the district court of Douglas county has jurisdiction of all the parties who claim this fund as well as of the holder thereof. If the statute quoted above was not in force, these facts would authorize the order made by the district court for the bank to interplead in this action and set up its claim to the fund in the hands of the insurance company. But this is not all. It appears that the assignment made of the insurance policy by Mrs. Marshall to Cummings was an oral assignment and that no notice of such an assignment was given to the insurance company prior to the time the bank attached the debt owing by the insurance company on the policy. Under such a state of facts the holding of the Connecticut courts is that the attaching creditor acquires a lien upon the fund superior to the lien of the assignee. (*Bishop v. Holcomb*, 10 Conn., 444; *Van Buskirk v. Hartford Fire Ins. Co.*, 14 Conn., 141.) While the rule in this state is that a creditor who attaches a chose in action acquires only a lien upon the interest which the defendant in the attachment suit had therein at the time the chose in action was seized. (*Coleman v. Scott*, 27 Neb., 77.)

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It will thus be seen that not only are there rival claimants of the fund in the hands of the insurance company and that it has been sued by two different parties in different jurisdictions for the fund, but that if the bank is allowed to prosecute its *scire facias* proceeding in the courts of Connecticut and not be compelled to interplead in this action, the insurance company is liable to have to pay the debt it owes twice. The insurance company has brought itself within the provisions of section 48 of the Code quoted above, and we think the facts of the case justified the order made by the district court requiring the bank to interplead in this action, and, without quoting the evidence introduced on the hearing of the motion to dismiss the bank from the case, we think the district court erred in making that order. The insurance company was entitled to an order permitting it to pay the fund in its hands into the custody of the court, and upon so doing to be dismissed from the case and to be discharged of all further liability for that fund, both to Cummings and the bank; or if it saw fit to remain in the case and defend the action of Cummings, it was entitled to an order enjoining the bank from further prosecuting its *scire facias* proceeding pending in the courts of Connecticut until the final termination of the action at bar. The judgment of the district court is reversed at the cost of the bank and the cause remanded for further proceeding in accordance with this opinion.

REVERSED AND REMANDED.

JOHN H. JONES V. JOHN WIESEN.

FILED JANUARY 7, 1897. No. 6963.

1. Negotiable Instruments: BONA FIDE PURCHASERS: INDORSEMENTS.

Where the payee of a negotiable promissory note indorses and delivers the same to his creditor to secure the payment of a debt

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owing to him, such creditor becomes an innocent holder of said note and acquires a lien thereon for the amount of his debt, provided he took it before maturity and without notice of any defenses thereto.

2. —: —: —. In such case, if another creditor of the payee, to secure his debt, pays the claim of the indorsee and takes an assignment of the note, he will, by such transaction, acquire the same lien and title to the note which his indorser had, whether the second creditor acquired it before or after maturity, and with or without knowledge of defenses existing against the note.
3. —: —: —. But one who purchases for value a negotiable note, either before or after its maturity, and with knowledge of a defense existing against the same, is entitled to enforce the collection of the entire note, provided his assignor was an innocent purchaser, before due, for value, in the usual course of business.
4. —: —: —. The purchaser of a negotiable promissory note at an execution or attachment sale thereof acquires thereby the interest which the execution or attachment defendant had in said note, and occupies the same relation to the maker of said note as he would had said note been indorsed to him without recourse by the payee.

ERROR from the district court of Cuming county. Tried below before NORRIS, J. *Reversed.*

A. H. Briggs, for plaintiff in error.

T. M. Franse, *contra.*

RAGAN, C.

June 13, 1891, John Wiesen executed and delivered his promissory note for \$50 to one F. P. Bellinger. The note was payable to Bellinger or bearer and matured six months after date. In the district court of Cuming county, John H. Jones sued John Wiesen on this note. Jones alleged that he was the owner of the note; that he had purchased it for value in the ordinary course of business, and before its maturity. Wiesen interposed as a defense to the note that it was given to Bellinger in consideration of the latter's promise to furnish him, Wiesen, certain medicine and medical attendance within a certain time; that Bellinger had made default in these promises,

and that Jones had notice that the consideration for said note had failed at the time he became the holder thereof. A jury was waived and the case was tried by the court, which found that the consideration for the note had wholly failed, and that Jones was not a *bona fide* holder thereof without notice, and dismissed his action. To reverse this judgment, Jones prosecutes here a petition in error.

The record shows, without conflict, that Wiesen gave the note to Bellinger in consideration of the latter's promise to furnish him certain medicine and medical attendance within a certain time, and that he had made default in these promises; that before this note matured Bellinger borrowed of a bank at Dodge, Nebraska, the sum of \$4 and pledged the note to secure the repayment of the sum borrowed; that the bank took this note without any knowledge of the consideration for which it was given; that Jones, learning that the bank held the note in suit, to secure a debt due to him from Bellinger paid to it its debt and the bank delivered the note to him. Subsequent to that time, Jones caused an execution or attachment to be levied upon this note as Bellinger's and the same to be sold, and purchased it at the sale. The bank having taken this note as collateral security for the loan made by it to Bellinger, in good faith and without notice of Wiesen's defense thereto, became thereby a good-faith holder of the note and had a lien upon it to secure the repayment to it of the \$4 loaned to Bellinger, and was entitled to enforce the collection of the note against Wiesen to the amount of its lien. (*Helmer v. Commercial Bank*, 28 Neb., 474; *Koehler v. Dodge*, 31 Neb., 328; *Haas v. Bank of Commerce*, 41 Neb., 754.) Jones having purchased the note of the bank for the amount of its lien against it, took the place of the bank and by such purchase became an innocent holder of the note and entitled to enforce its collection against Wiesen for the amount which he had paid the bank. The fact that Jones knew, at the time the bank sold him the note, that the consid-

eration promised Wiesen for its execution had failed did not make Jones any the less an innocent holder for value before maturity, since one who purchases for value a negotiable instrument, after its maturity or before, with knowledge of a defense existing against the same, is entitled to enforce the collection of the entire note, provided his assignor was an innocent purchaser before due, for value, in the ordinary course of business. (*Kochler v. Dodge*, 31 Neb., 328; *Butterfield v. Town of Ontario*, 32 Fed. Rep., 891; *Bodley v. Emporia Nat. Bank*, 16 Pac. Rep. [Kan.], 88.) This rule rests upon the principle that a second indorsee takes whatever title his indorser had, and since his indorser was entitled to enforce the note against the maker, notwithstanding equities existing in the latter's favor against the original payee, the second indorsee is entitled to the same protection.

In the case at bar the bank of Dodge was an innocent holder before due, for value, in the usual course of business of the note in suit, and entitled to enforce its collection to the extent of the loan made by it to Bellinger, and Jones, by paying Bellinger's debt to the bank and taking up the note, took the same title to it that the bank had. It follows that Jones was entitled to recover upon the note in suit the amount of money he paid to the bank. Jones, by having this note sold on execution or attachment, acquired the legal title thereto, but by that sale he acquired only the interest which Bellinger had in the note, and this interest was subject to the bank's lien upon it for the money loaned to Bellinger and was subject to whatever defense Wiesen had against the same. In other words, where one purchases a negotiable promissory note or other chattel at a sheriff's sale thereof under execution or attachment, such purchaser simply takes whatever interest the execution or attachment defendant had in the note or chattel sold. But such a purchaser of negotiable paper, even before its maturity, is not an innocent holder within the meaning of the law. The title acquired by such a purchaser is precisely what

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he would have acquired to such a note had it been indorsed to him without recourse by the payee thereof. The judgment of the district court is reversed.

REVERSED AND REMANDED.

STERLING P. JAMISON, SHERIFF, v. JAMES B. KENT.

FILED JANUARY 7, 1897. No. 6865.

Instructions: REPETITIONS. It is not error for a district court to refuse instructions asked when the propositions of law embraced therein are included in instructions given by the court on its own motion.

ERROR from the district court of Boyd county. Tried below before KINKAID, J. *Affirmed.*

R. R. Dickson and H. M. Uttley, for plaintiff in error.

John H. Mosier and M. F. Harrington, contra.

RAGAN, C.

This is an action of conversion brought in the district court of Boyd county by James B. Kent against Sterling P. Jamison, sheriff of said county, and the Ayers, Weatherwax & Reed Company, a mercantile corporation. The corporation seized the property sued for on attachment as the property of Mlinar and Tazler. Kent claimed the property by purchase from the attachment defendants, and the defense to this action was that the sale from the attachment defendants to Kent was fraudulent. Kent had a verdict and judgment and the defendants below prosecute here a petition in error.

1. The first argument is that the court erred in not giving instructions numbered 1 and 2 requested by the plaintiff in error. This assignment cannot be sustained,

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for the reason that every proposition of law involved in the instructions refused was embraced in other instructions given to the jury by the district court on its own motion.

2. The second assignment of error is that the verdict is not sustained by sufficient evidence. We think it is. The judgment of the district court is

AFFIRMED.

NORTHERN ASSURANCE COMPANY OF LONDON V. JOHN R.
HAMILTON ET AL.

FILED JANUARY 7, 1897. No. 7009.

Insurance: CANCELLATION BY AGENT: LIABILITY OF AGENT FOR PREMIUMS. A fire insurance agent issued policies on behalf of his principal, the premium of which amounted to \$——. Learning that his agency was, or was about to be, revoked, he canceled such policies and issued in lieu thereof others on behalf of insurance companies of which he was also agent. He did not cancel any of said policies at the request of his principal, at the request of the insured, nor because an exigency had arisen which made it necessary for him to cancel them for the protection of his principal's interest. His principal sued him for the premiums collected and he interposed the cancellation of the policies as a defense. *Held*, That the defense was untenable, and that the agent was liable for the premiums of the policies canceled.

ERROR from the district court of Douglas county.
Tried below before OGDEN, J. *Reversed*.

The facts are stated by the commissioner.

Montgomery & Hall, for plaintiff in error:

The agent's action in attempting to cancel the policies was a flagrant violation of the duties he owed his employer, and should not be sanctioned by the courts. It was entirely inconsistent with the law which governs the relation of principal and agent. (*Davis v. Hamlin*, 108 Ill., 39; *Warren v. Burt*, 58 Fed. Rep., 101; *American Steam*

Boiler Ins. Co. v. Anderson, 29 N. E. Rep. [N. Y.], 231; *Rockford Watch Co. v. Manifold*, 36 Neb., 801; *Jansen v. Williams*, 36 Neb., 869; *Oliver v. Lansing*, 48 Neb., 338; *Edmonstone v. Hartshorn*, 19 N. Y., 9; *United States Fire & Marine Ins. Co. v. Tardy*, 2 Ins. L. J. [Ala.], 672; *Scottish Union & Nat. Ins. Co. v. Dangaix*, 15 So. Rep. [Ala.], 956; *Frazen v. Zimmer*, 90 Hun [N. Y.], 103; *Milwaukee & Wyoming Investment Co. v. Johnston*, 35 Neb., 560; *Ambler v. Phillips*, 19 Atl. Rep. [Pa.], 71; *Hibbard v. Peck*, 44 N. W. Rep. [Wis.], 641; *Globe Milling Co. v. Minneapolis Elevator Co.*, 46 N. W. Rep. [Minn.], 306; *Ulmer v. Farnsworth*, 15 Atl. Rep. [Me.], 65; *Farnsworth v. Hemmer*, 1 Allen [Mass.], 494; *Bowe v. Hyland*, 46 N. W. Rep. [Minn.], 142; *Raisin v. Clark*, 41 Md., 158; *Merchants Ins. Co. of Newark v. Prince*, 52 N. W. Rep. [Minn.], 131.)

Joseph R. Clarkson, contra.

RAGAN, C.

The Northern Assurance Company of London (hereinafter called the company) brought this suit in the district court of Douglas county against John R. Hamilton and the sureties on his bond, as the company's agent, to recover a sum of money which the company alleged Hamilton had collected as premiums for insurance risks placed by him and not accounted for. The defense of Hamilton, so far as the same need be noticed, was that he had liquidated the sum sued for by canceling policies issued by him as agent of the company, the premiums for which policies equaled the sum sued for, and that he made such cancellations in pursuance of a usage and custom existing among insurance men in the city of Omaha, where he resided, and in other parts of the United States. Hamilton had a verdict and judgment and the company brings the case here for review on error.

There is little or no conflict in the evidence, which shows that the company appointed Hamilton its agent in August, 1891, to solicit and write insurance for it in

Omaha and vicinity; to collect the premiums paid; to transact generally on its behalf the business of a local insurance agent; that it revoked his agency on the 25th of November, 1891, and that he owes the company the sum sued for unless he has liquidated it by canceling its policies as pleaded by him. Hamilton's method of liquidating the debt sued for by canceling its policies may be illustrated thus: On behalf of the company, Hamilton issues policies to A, B, and C, the premiums for which amount to \$1,000. Deducting Hamilton's commissions, there remain in his hands \$700 premiums belonging to the company. He remits to the company \$300 of this sum. He then learns that his agency has been, or is about to be, revoked, and without the request of the insured he cancels the policies issued to A, B, and C, and instead of refunding to them the premiums they had paid he places their risks in other insurance companies, of which he is also agent, and when sued for the \$400 he sets up as a defense the cancellation of the policies of A, B, and C. This is a novel way of paying a debt. The company made Hamilton its agent for the purpose of building up and extending its business, and for the purpose of taking insurance risks, not for the purpose of destroying it; and the law required of Hamilton that, as the company's agent, he should act in good faith with it and do what he could to extend its business. We do not say that an agent of an insurance company may never cancel a risk issued by him on behalf of his principal, but we do say that he has no right to cancel such a risk without the request of his principal or the request of the insured, unless an exigency has arisen which makes it his duty to cancel the risk in order to subserve the interests of his principal; we do say that he has no right to cancel a risk solely for the purpose of furthering his own ends, and in his own interest and against his principal's interest. Hamilton did not cancel these risks at the request of his principal, nor at the request of the insured, nor did he cancel them because an exigency had arisen

which made it necessary for him to cancel them in order to protect his principal's interest. He canceled them solely because he knew that his agency was revoked, or was about to be revoked, and for the purpose of having these risks carried by companies for whom he was agent. In doing this he was working against the interest of his principal.

Counsel for the insurance company have furnished us a brief and cited numerous authorities to show that Hamilton's conduct in this case was indefensible. We have no doubt the authorities sustain counsel's view; we have not examined them; no authorities are necessary. On the broad principles of common sense and fair dealings, Hamilton cannot be allowed to liquidate his debt to the company in the manner attempted in this case. No evidence was introduced on the trial to sustain the plea of Hamilton that he made these cancellations in pursuance of a custom, and it is not suggested, either by pleading or evidence, that he canceled these risks in good faith for the purpose of protecting his principal, or that he did so at the request of either his principal or the insured. Nor can the judgment be sustained upon the ground of a ratification of Hamilton's acts by the company. The judgment is wrong. It is reversed and the cause remanded.

REVERSED AND REMANDED.

GURDON W. WATTLES, APPELLEE, v. SOUTH OMAHA ICE
& COAL COMPANY, APPELLANT.

FILED JANUARY 7, 1897. No. 8810.

1. **Landlord and Tenant: REPAIRS.** An express agreement of a lessee to keep in good repair leased premises, and at the end of the expiration of the term surrender their possession in as good condition as they were when he entered, natural decay, wear and tear ex-

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cepted, is not, and does not include, a covenant to rebuild buildings destroyed without his fault.

2. ———: ———. If such was the common law rule of construction of such a covenant, it is not in force in this state.
3. ———: ———: RENT. Where a substantial portion of leased premises is destroyed without the fault of the lessee, he is entitled to an apportionment of the rent covenanted to be paid and accruing thereafter, in the absence of an express assumption by him of the risk of such destruction.
4. ———: ———: ———. The common law rule of construction of such a covenant is not in force in this state.

APPEAL from the district court of Douglas county.
Heard below before KEYSOR, J. *Reversed.*

The facts are stated by the commissioner.

Charles Offutt, for appellant:

Appellant is not required to reconstruct the buildings destroyed by the hurricane August 22, 1896. (Taylor, Landlord & Tenant [7th ed.], sec. 358; *Whitaker v. Hawley*, 25 Kan., 692; *Pollard v. Shaffer*, 1 Dal. [Pa.], 210; 12 Am. & Eng. Ency. Law, 721; *Warner v. Hitchins*, 5 Barb. [N. Y.], 666; *Levey v. Dyess*, 51 Miss., 501; *Miller v. Morris*, 55 Tex., 412; *Waincott v. Silvers*, 13 Ind., 500; *Warren v. Wagner*, 75 Ala., 188; *Maggort v. Hansbarger*, 8 Leigh [Va.], 536; *Lister v. Lane*, L. R., 2 Q. B. Div. [Eng.], 212; *Howeth v. Anderson*, 25 Tex., 557; *Nave v. Berry*, 22 Ala., 382; *Halloway v. Lacy*, 4 Humph. [Tenn.], 468.)

Appellee Wattles is compelled to reconstruct the buildings as a condition precedent to his right to collect all the rent stipulated in the lease after August 22, 1896. (*Brooks v. Hiatt*, 13 Neb., 503; *Lanning v. Burns*, 36 Neb., 236; *Whitaker v. Hawley*, 25 Kan., 687.)

In the event of appellee's failure to rebuild after reasonable demand, appellant can require an apportionment of the rent from the date the buildings were destroyed to the expiration of the lease. (Taylor, Landlord & Tenant [7th ed.], sec. 520; *Whitaker v. Hawley*, 25 Kan., 692; *Pollard v. Shaffer*, 1 Dal. [Pa.], 215; *Ripley v. Wightman*,

4 McCord [S. Car.], 447; *Coogan v. Parker*, 2 S. Car., 255; *Doe v. Burt*, 1 Term R. [Eng.], 701; *Richard Le Tavenor's Case*, 1 Dyer [Eng.], 56a; *Brown v. Quilter*, Amb. [Eng.], 619; *Cutter v. Powell*, 6 Term R. [Eng.], 320.)

James H. Macomber, contra:

Appellant is bound to repair the buildings before the termination of the term of the lease. (12 Am. & Eng. Ency. Law, 721; *Polack v. Pioche*, 35 Cal., 416, 95 Am. Dec., 121, and note; *Blount v. City of Janesville*, 31 Wis., 654; *Columbus v. Watson*, 26 Ind., 52; *Fisher v. Milliken*, 8 Pa. St., 111; *Workman v. Mifflin*, 30 Pa. St., 369; *United States v. Bostwick*, 94 U. S., 53; 1 Wood, Landlord & Tenant, sec. 373; 1 Taylor, Landlord & Tenant, sec. 357; 1 Washburn, Real Property [4th ed.], 535; 2 Kerr, Real Property, secs. 1232, 1233; *Kling v. Dress*, 5 Robt. [N. Y.], 521; *Stultz v. Locke*, 47 Md., 562; *Gluck v. Mayor of Baltimore*, 81 Md., 315.)

The rent stipulated in the lease must be paid as if the buildings had remained intact. (*Minneapolis Co-Operative Co. v. Williamson*, 38 Am. St. Rep. [Minn.], 482; *Fowler v. Payne*, 49 Miss., 32; *Harrington v. Watson*, 11 Ore., 143; *Womack v. McQuarry*, 28 Ind., 103; *Chamberlain v. Godfrey*, 50 Ala., 533; *Bueryer v. Boyd*, 25 Ark., 441; *Harris v. Heackman*, 62 Ia., 411, 12 Am. & Eng. Ency. Law, 741, and cases cited; *Stubbings v. Evanston*, 136 Ill., 37; *Parks v. City of Boston*, 15 Pick. [Mass.], 198; *Foot v. City of Cincinnati*, 11 O., 408; *Turner v. Townsend*, 42 Neb., 376; *Smith v. Kerr*, 108 N. Y., 31; *Salisbury v. Shirley*, 66 Cal., 223; *Lodge v. White*, 30 O. St., 569; *Hicks v. Martin*, 25 Mo. App., 359; *McMillan v. Solomon*, 42 Ala., 356; *Chamberlain v. Godfrey*, 50 Ala., 530; *Kerr v. Merchants Exchange*, 3 Edw. Ch. [N. Y.], 315; *Winton v. Cornish*, 5 O., 477; *Beham v. Ghio*, 75 Tex., 87; *Hilliard v. Gas Coal Co.*, 41 O. St., 662; *Graves v. Berdan*, 26 N. Y., 498; *Stockwell v. Hunter*, 11 Met. [Mass.], 448; *Smith v. McLean*, 123 Ill., 210; *Whitaker v. Hawley*, 25 Kan., 674.)

RAGAN, C.

On the 1st day of November, 1894, Gurdon W. Wattles and F. L. Cotton entered into an agreement in writing in and by which Wattles leased to Cotton for five years from said date the east one-half of the southwest quarter of the northwest quarter of section 1, township 15 north and range thirteen (13) west of the 6th P. M., "together with the buildings situated thereon." A rent of \$6,000 was reserved, payable in 60 installments of \$100 each. The first installment was paid at the date of the execution of the lease and one installment fell due on the first day of each month thereafter. In the lease, Cotton covenanted as follows: "That at the expiration of the term above granted * * * he will quietly and peaceably yield up possession of said premises * * * in as good condition as the same were when entered upon, ordinary wear or damage by fire excepted. * * * It is understood and agreed that the buildings on the above described property have been placed in good repair by [the lessor] and shall be kept in the same condition by [the lessee] during the term of this lease, natural decay and wear and tear excepted." Cotton assigned his interest in this lease to the South Omaha Ice & Coal Company, hereinafter called lessee, which took possession of the leased premises and began using the same for the purposes for which they were leased; that is to say, for harvesting ice formed on the waters on said leased lands and storing such ice in the buildings thereon. The rent reserved was paid up to the 1st day of September, 1896. On the 22d day of August of said year the buildings on the leased premises "were destroyed and rendered entirely valueless by a violent wind storm or hurricane." Notwithstanding the destruction of the ice houses, the lessor claimed that he was entitled to collect the rent reserved in the lease accruing subsequent to the destruction of the buildings; that he was under no obligation to rebuild the destroyed ice houses, but that the lessee was bound to re-

build the same. The lessee denied that he was bound to rebuild the destroyed ice houses and insisted that he was entitled to an apportionment of the rent reserved until such time as the lessor should rebuild the houses destroyed. The parties made up an agreed case under the provisions of sections 567, 568, 569 of the Code of Civil Procedure and submitted it to the district court of Douglas county. The parties filed in the agreed case in the district court a stipulation of the facts. This stipulation recited the execution of the lease between Wattles and Cotton; the assignment of his interest in the lease by Cotton to the South Omaha Ice & Coal Company; the covenants in the lease already mentioned; the taking possession of the leased premises by the lessee; the payment of the rent to September, 1896, and the destruction of the ice houses by a hurricane. The stipulation further recited that the premises had been leased for the sole and exclusive purposes of gathering ice formed on the waters on said lands and storing such ice in the buildings situate thereon; that 15 acres of the demised land were covered with water from which in the winter ice was gathered for storage; that the destroyed buildings were 6 in number, built together, each 100 feet long and 20 feet in width, and had a storage capacity for ice of from 8,000 to 10,000 tons; that there were no other buildings or improvements of any kind on the leased premises at the time they were leased or since; that the fair rental value of the entire premises was \$1,200 per year, and that the fair rental value of the premises since the destruction of the ice houses, or without them, was \$600 per year. The district court was of opinion that the agreements and premises made in the lease by the lessee amounted to a covenant on his part to rebuild the destroyed ice houses and that he was liable for all the rent reserved in the lease and entered a decree accordingly. The lessee has appealed.

This case should be treated in all respects as though it was an ordinary action at law by the lessor to recover

the rent reserved in the lease and that the lessee had interposed as a defense the destruction, without his fault or the fault of the lessor, of a substantial part of the leased premises, and invoked in his answer, by way of a cross-petition, the equitable power of the court for an apportionment of the rent.

1. The lessee covenanted to keep in repair the leased premises and at the expiration of the term surrender them in as good condition as they were when he entered, ordinary wear and tear and natural decay excepted. Does this covenant include a promise by the lessee to restore the buildings destroyed without his fault? That it does is the first argument urged in support of the decree. It is insisted that such was the rule of construction applied to such a covenant at common law.

The earliest American case which we have been able to find, which supports the contention under consideration, is *Phillips v. Stevens*, 16 Mass., 237, decided in 1819. The lessee covenanted that he "would keep in repair, support and maintain all and singular the fences and buildings, saving and excepting the natural decay of the same, as should be needful, at his own proper cost and charge; and at the end of said term * * * would quietly leave, surrender, and yield up the premises in as good condition as the same were in" at the date of his lease. The buildings on the leased premises were destroyed by fire without the fault of the lessee, and the supreme court of Massachusetts, in construing the covenant in the lease, held it to be a contract binding the lessee to rebuild the burned buildings.

In *Beach v. Crain*, 2 N. Y., 87, the lease provided that the lessor should, at his own cost, erect a gate at the terminus of a road on the leased premises and keep the gate there during his pleasure, and that all repairs necessary to be made to said gate were to be made by the lessee. Some person unknown, but without the fault of the lessee, removed the gate, and the court of appeals of New York held that the covenant of the lessee to repair

the gate included a contract on his part to replace it with a new one.

In *Polack v. Pioche*, 35 Cal., 416, it seems that the lease contained the usual covenant of the lessee to repair and keep in repair the demised premises. The buildings on the leased land were destroyed by the breaking of the embankment of a reservoir, and this was caused by the act of someone, but not by any fault of the lessee. The court held that the covenant of the lessee to repair bound him to restore or rebuild the destroyed buildings; and the court declared that such had been the settled rule of construction of such a covenant since the time of Edward III.

In *Ely v. Ely*, 80 Ill., 532, the lessee covenanted that he had received the leased premises in good order and condition, and that he would keep them in repair at his own expense, and that at the end of the term he would deliver the same up to his lessor in as good order and condition as when they were entered upon. The buildings upon the leased premises were wholly destroyed by fire without the fault of the lessee, and the supreme court of Illinois held that the legal effect of the covenant of the lessee to keep the demised buildings in repair, etc., was that in case the buildings burned he would rebuild the same.

In *David v. Ryan*, 47 Ia., 642, the lessee covenanted that she would keep the leased premises in a good state of repair. They were destroyed by fire and the court held that the covenant of the lessee bound her to restore the buildings.

In 1 Taylor, Landlord & Tenant [8th ed.], sec. 357, the rule is stated as follows: "When a tenant is under an express covenant to repair the premises, he is liable to make good all loss and damage which they may sustain, and must even rebuild in case of casualty by fire or otherwise."

In 12 Am. & Eng. Ency. of Law, p. 721, the authorities in support of the rule under consideration are collated and the rule is thus stated: "The alteration in the ten-

ant's liability for repairs, produced by his executing a lease in which he makes an express covenant to repair, is so marked that he becomes liable to make good all loss and damage the premises may sustain, and must even rebuild in case of casualty by fire or otherwise."

Among the cases cited in the Encyclopedia of Law and by Taylor is the case of *Phillips v. Stevens*, *supra*, and that case seems to have been relied upon in the cases cited by us from New York, Illinois, California, and Iowa. The court in *Phillips v. Stevens* based its decision upon the principle that when one "by his own contract * * * creates a duty or charge upon himself he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract;" and this is the principle upon which the cases from Illinois, Iowa, California, and New York mentioned above were decided.

No one can find fault with the principle that a man should be compelled to perform what he has promised; but, with all due respect to the supreme court of Massachusetts, it seems to us that the court ignored the entire issue. The question there was not whether the lessee was obliged to perform a covenant he had made, but the question was what covenant he had made; that is, whether his covenant to repair and keep in repair the demised premises included within it a contract on his part to rebuild the buildings on the leased premises if they should be destroyed. But in that case, as in the other cases cited, and in every case that we have been able to find which supports the contention of the appellee here, it was taken for granted that the rule at common law was that a covenant by a lessee to repair was equivalent to and involved a covenant to rebuild. Assuming, however, that such was and is the rule of construction at common law, are we bound by that rule?

Section 1, chapter 15, Compiled Statutes of this state, provides that so much of the common law of England as is applicable and not inconsistent with any law passed

or to be passed by the legislature of this state, is adopted and declared to be law within the state. Section 53, chapter 73, Compiled Statutes, provides that "in the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." If, then, the rule at common law is as is contended by the appellee, it is at most but a rule of construction, and we are not bound to apply that rule of construction to a real estate contract if to do so would result in giving to the contract an effect not within the contemplation or intention of the parties at the time it was made. We do not know why a lease for real estate should not be construed as any other contract,—why we should not apply to it the test universal among all civilized peoples, namely, to look to the subject-matter of the contract, the language of the parties, and ascertain, if we can, what was their intention; on what proposition did the minds of the contracting parties meet; what did they consciously consent to. If we apply this rule of construction to the contract under consideration we have for subject-matter of the contract a small tract of land, fifteen acres of which was covered with water. From this water ice could be harvested in the winter season, and stored in buildings then standing upon the leased premises. The lessee accepted his lease and entered upon these premises to use them solely for the purposes of harvesting and storing ice. When he did so he stipulated that the leased premises were in good repair, in good condition, and he promised that he would keep them in good repair and at the expiration of his lease so surrender them. What did the parties to this contract understand and intend by the terms "repair" and "keep in repair"? These words "repair" and "keep in repair" are not technical words, nor should they be given a technical or strained interpre-

tation. They should receive their ordinary interpretation. To repair, as it is ordinarily used, means to amend, not to make a new thing, but to refit, to make good or restore an existing thing. (See *Todd v. Inhabitants of Rowley*, 8 Allen [Mass.], 51; *Stevens v. Milnor*, 24 N. J. Eq., 358.) When we speak of repairing a thing, the very expression presupposes something in existence to be repaired. If a carpenter contracts to repair a house, or a mason a chimney, the ordinary construction of these contracts would not be that these parties had agreed to build a new house or a new chimney. If the construction of the lessee's covenant contended for by the appellee here be correct, then had this entire tract of land and its buildings been swept away by a flood of the Missouri river, the lessee would be liable for their value to the lessor. Before we can say that a lessee assumed the liability of any such a contingency as that supposed, we must find his assumption of such a risk in the clear and express language of his contract.

In *Pollard v. Shaffer*, 1 Dall. [U. S.], 210, the lessee covenanted to pay rent and deliver up the premises in good repair. The lessor sued for a failure of the covenant to keep in good repair. The lessee pleaded that an alien enemy—the British army—invaded the city of Philadelphia, took possession of the leased premises, and committed the destruction made the subject of the lessor's action. The question was whether the special matter pleaded was a defense. The supreme court of Pennsylvania held that it was. In that case, as in the case at bar, it was insisted that the covenant of the lessee to keep the demised premises in repair bound him to restore the buildings if destroyed. The court said: "I am of opinion that the defendant is excused from his covenant to deliver up the premises in good repair: (1) Because a covenant to do this against an act of God or an enemy ought to be special and express, and so clear that no other meaning could be put upon it; (2) because the defendant had no consideration, no premium for this risk, and it

was not in the contemplation of either party. * * * Suppose when the lease was executed that the lessee had been asked, 'Is it your meaning that in case the buildings shall be destroyed by an act of God or public enemies you are to rebuild or repair them?' His answer would have been, unquestionably, 'No, I never entertained such an idea.' Should the like question have been put to the lessor, his answer would certainly have been 'No, I did not expect anything so unreasonable.' "

In *Levey v. Dyess*, 51 Miss., 501, it was held that in the absence of covenants by the lessee amounting to express covenants to rebuild structures destroyed by casualty, or by proof of negligence by the lessee, the loss is on the landlord.

In *Warren v. Wagner*, 75 Ala., 188, the lessee covenanted that at the expiration of the lease he would surrender the premises in as good order and condition as they were when he accepted them, usual wear and tear excepted, and it was held that this covenant did not include an agreement on the part of the lessee to rebuild the structures on the premises destroyed by fire. To the same effect see *Howeth v. Anderson*, 25 Tex., 557. In that case the court said: "Leases are construed like other written agreements, so as to give effect to the intention of the parties." To the same effect *Warner v. Hitchins*, 5 Barb. [N. Y.], 666. In that case the covenant of the lessee was to surrender possession of the leased premises at the expiration of the term in the same condition they were in at the commencement of the lease, natural wear and tear excepted. The leased buildings were destroyed by fire and it was insisted in behalf of the lessor that the covenants of the lessee included a covenant to rebuild. But the court said that in order to hold the lessee liable for the value of the destroyed buildings he must have expressly agreed to rebuild them or restore them.

In *Wainscott v. Silvers*, 13 Ind., 497, the covenant of the lessee was, at the expiration of the term, to surrender the leased premises in as good condition as when they

were received. The court said: "The law as between landlord and tenant we understand to be that the tenant is not responsible for buildings accidentally burned down during his tenancy, unless he has expressly covenanted or agreed to repair. It is not sufficient to charge him that he agreed * * * to surrender the premises at the end of his term in the same repair or condition they were in at the time of the contract."

We reach the conclusion that an express agreement of a lessee to keep in good repair leased premises, and at the expiration of the term surrender their possession in as good condition as they were when he entered, natural decay, wear, and tear excepted, is not, and does not include, a covenant to rebuild buildings destroyed without his fault.

2. The lessor in this case is under no obligation to rebuild the destroyed buildings during the term, for the simple reason that he has not contracted so to do. (*Turner v. Townsend*, 42 Neb., 376.)

3. By the lease under consideration the premises were let to the lessee for a specified term, in consideration of which he covenanted to pay to the lessor a specific sum as rent, payable in installments on certain dates during the term. The lease contained no provision binding the lessor to rebuild. The lease contained no provision for any abatement of the rent promised, for any reason whatsoever. The question presented is: A substantial part of the leased premises having been destroyed without the fault of either lessor or lessee, is the latter entitled to an apportionment of the rent accruing thereafter? The common law construction of such a covenant as this would not relieve the tenant from payment of the entire rent reserved. The old English case of *Paradine v. Jane*, Aleyn [Eng.], 26, was a suit on a covenant to pay rent. The lessee defended the action on the ground that during the civil wars of England Prince Rupert, an alien born, with a hostile army, had driven him out of possession of the premises. But the court decided that although the whole

army had been alien born enemies, the lessee was still bound to pay the entire rent reserved, because he had expressly covenanted so to do. This construction of the covenant to pay rent has been very generally followed in the United States. (See the rule stated and the authorities collated in 12 Am. & Eng. Ency. of Law, p. 741.) In 1787 the question was presented to the supreme court of Pennsylvania in *Pollard v. Shaffer*, 1 Dall. [U. S.], 210. In that case the lessee defended against an action for rent upon the ground that he had been deprived of the use of the premises by an alien enemy, namely, the British army. But the court followed the common law rule announced in *Paradine v. Jane*, *supra*, and held the lessee liable for the entire rent reserved. The principle upon which the court based its decision was (1) that the covenant to pay the rent was express, and (2) that since, by the lease, the lessee was to have the advantage of casual profits of the leased premises, he should run the hazard of casual losses during the term. The question was presented to the supreme court of Massachusetts in 1809, in *Fowler v. Bott*, 6 Mass., 62. The lease in that case was for a mill and it was destroyed by fire during the term. The court followed the common law rule and held that the lessee was liable for the entire rent reserved. In that case the court seems to have based its decision upon the ground that the lease amounted to a bargain and sale of the leased premises for the term. The common law rule of construction quoted above was also followed in *Fowler v. Payne*, 49 Miss., 42, *Harrington v. Watson*, 11 Ore., 143, *Womack v. McQuarry*, 28 Ind., 103, *Lauffer v. Glenn*, 33 N. W. Rep. [Minn.], 10, and in many other cases not necessary to cite here. Chancellor Kent, discussing the question under consideration, says: "It is well settled that upon an express contract to pay rent the loss of the premises by fire or inundation, or external violence, will not exempt the party from his obligation." (3 Kent, Commentaries [13th ed.], sec. 466.) The rule announced in *Paradine v. Jane* has been abolished by statute in the

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state of New York, and perhaps some other states, and the courts of last resort in the states of Kansas and South Carolina have declined to follow the rule, but, with these exceptions, we think it may be safely said that in every other state where the rule has been presented for consideration to the court of last resort it has been followed. In 1832 the supreme court of Ohio announced an exception to this rule. In that case the leased premises consisted of a cellar or basement in a building several stories high. The entire building was destroyed by fire, without the fault of the lessee, and the lease contained no covenant on the part of the lessor to rebuild, and the court held that the destruction of the leased premises terminated the relation of landlord and tenant. This case was followed and the exception sustained in *Stockwell v. Hunter*, 11 Met. [Mass.], 448; *Graves v. Berdan*, 26 N. Y., 498; *Harrington v. Watson*, 11 Ore., 143; *Ainsworth v. Ritt*, 38 Cal., 89; *McMillan v. Solomon*, 42 Ala., 356. Indeed, the exception to the rule seems to be about as well established in the United States as the rule itself. In some of the cases following the rule the reasons for its existence are said to be that it is only equitable that the lessee should pay the entire rent notwithstanding a destruction of a part of the leased premises, since the lessor must bear the loss of the destroyed property; and that the enforcement of the rule tends to diminish the carelessness and increase the vigilance of a lessee. We do not know what reason led to the formulation of this rule, but if the one quoted above is the correct one, it is of no force at the present time, because the lessor may protect his interest in the property while in the hands of the lessee by insurance. The reason given for the formulation of the exception to the rule is that by a lease of a room or basement in a building no interest in the soil passes to the lessee, and that when the basement or room is destroyed the leased estate is gone and the relation of landlord and tenant terminated. But it seems to us that another principle underlies and controls the excep-

tion, and that is this: That the leased room or building having been destroyed without the fault of the lessee, the consideration for his promise to pay the rent accruing thereafter failed. The common law rule announced in *Paradine v. Jane* is merely a rule of construction of a real estate contract.

We have already seen to what extent the common law is in force in this state and have noted the command of the legislature to the courts of this state in construing real estate contracts to look to the subject-matter of the contract, the language employed by the contracting parties, and to ascertain if possible, and give effect to, the intention of the contracting parties. A lease for real estate is not a bargain and sale for a given time of the lessor's interest in the leased premises. It is rather a hiring or letting of property for a certain time and for a named consideration; and when a lessee covenants to pay rent for a term the consideration for that covenant is his right to the use and occupancy of the thing leased. In the covenant of a lessee to pay at stated times certain sums of money for the rent—that is, for the privilege or the right to use and occupy the leased premises—is involved the condition that such leased property shall be in existence and be capable of being used and enjoyed by the lessee. The promise to pay a stated sum of money as rent for leased premises for a certain term is based upon the presumption that the leased premises shall exist for the term. In the case at bar, if the lessee had been evicted from part of the demised premises by the holder of a title paramount to that of the lessor's, the lessee would be entitled to an apportionment of the rent. (Taylor, Landlord & Tenant, sec. 387, and cases there cited.) Under the exception established to the rule, had the entire leased premises been washed away by a flood, the relation of landlord and tenant existing between the parties to this suit would have from that moment ceased. This relation would not have been terminated by the act of the parties, but by operation of law, and the lessee would have been

relieved from the payment of rent accruing thereafter, upon the principle that the consideration for his promise to pay such rent had failed. If we look to the subject-matter of the lease under consideration and the language employed by the parties in making the contract, we cannot say that either of these parties, at the time they made this lease, had in contemplation the fact that the leased premises, or any part thereof, might be destroyed by a hurricane. They did not contract with reference to such a casualty. To use the language of McKean, C. J., in *Pollard v. Shaffer*, *supra*, had the lessor been asked at the time this lease was made, "Is it your intention to hold the lessee liable for the entire rent reserved in case the leased buildings shall be destroyed by cyclone?" he doubtless would have answered that he had never considered that contingency. If the question had been asked the lessee whether it was his intention to pay the entire \$6,000 rent even if one-half of the leased property should be destroyed before the expiration of the term, it is very probable that he would have said that he had no such an intention. Yet in construing this contract we must, if possible, give effect to the intention of the parties, notwithstanding the common law rule of construction. To us it seems that the lessor, in effect, said to the lessee: "I own this tract of land and these ice houses; they are in good repair; they are fit for the purposes of harvesting and storing ice; I will hire them to you for five years if you will pay me \$1,200 per year and keep the premises in good repair." To this the lessee assented. This was an offer and a promise upon the part of the lessor to furnish for the entire time the hired property; it was a promise and a covenant upon the part of the lessee to pay the monthly installments of rent for the right to use and occupy the hired property if it existed. But it was not a proposition on the part of the lessor to quitclaim his right to the use and occupancy of the leased premises to the lessee for five years in consideration of \$6,000 paid, or to be paid, by the latter. This rule of construction of the

common law is a harsh and a technical one. We do not certainly know the conditions that existed when it was formulated, nor do we know in what reasons it had its origin, but we do know that since the decision of *Paradine v. Jane* the conditions of the race have changed; its conscience and intellect have been quickened, and this rule, however meritorious it may have been at the time and place of its origin, is opposed to the genius and spirit of the present age and in conflict with its judgment and conscience. In one or two instances, in states where its effect has not been even limited by statute, its applicability to real estate contracts in this country has been questioned. Such was the case of *Ripley v. Wightman*, 4 McCord [S. Car.], 447, where it was held that the fact that a house had been rendered untenable by a hurricane afforded the lessee a defense to the action for the rent. In *Whitaker v. Hawley*, 25 Kan., 674, the buildings upon the leased premises were wholly destroyed by fire without the fault of the lessee, and the court held that because of the accidental destruction by fire of the buildings upon the leased premises the lessee was entitled to an apportionment of the rent. In that case Brewer, J., speaking for the court, said: "And right here it may be remarked that a lease is in one sense a running rather than a completed contract. It is an agreement for a continuous interchange of values between landlord and tenant rather than a purchase single and completed of a term or estate in lands." We are aware that this case stands practically alone, and in a foot-note to *McMillan v. Solomon*, 94 Am. Dec., 654, its isolation is pointed out with a remark by the editor that it is supported by "much charity and some logic." We approve of the opinion because we think it is good law as well as good sense. We approve of it also because it is a magnificent protest against slavish devotion to antiquated rules; and we approve of it because it breathes the spirit of humanity and equity and is based on a thought of the nineteenth century. We reach the conclusion that the common law rule

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of construction under consideration is not in force in this state and formulate the rule as follows: Where a substantial portion of leased premises is destroyed without the fault of the lessee, he is entitled to an apportionment of the rent covenanted to be paid and accruing thereafter, in the absence of an express assumption by him of the risk of such destruction. The decree appealed from is reversed and the cause remanded with instructions to the district court to enter a decree in accordance with this opinion.

REVERSED AND REMANDED.

IRVINE, C., dissenting.

The case resolves itself into three general questions: First, is the defendant obligated to rebuild the ice houses; second, if not, is the plaintiff so obligated; and third, if neither party is obligated to rebuild, by what rule is the right to rent to be determined? On the first question we need do no more than express our entire approval of the reasoning and conclusions contained in the opinion of Commissioner RAGAN. We think a general covenant to repair cannot be reasonably construed as a covenant to restore buildings after their total destruction by the act of God, and that those cases which give that effect to such a covenant are sustained neither by reason nor well founded authority, as demonstrated in the opinion of Commissioner RAGAN. The cases supporting that view have been based on a misconception of the common law. We think, also, that in the absence of a covenant for that purpose the lessor is not obligated to rebuild. On the third question our conclusion is that under the facts stipulated the lessee, if it remain in possession, is bound to pay the rent reserved, without apportionment, for the whole term. We concede that there is much natural justice in the doctrine that on the destruction, without fault of the parties, of a substantial portion of the leased premises, the rent should be abated in proportion to the loss so sustained. The opinion of Commissioner RAGAN in

support of that view is as able an exposition as could well be made, but we think he fails to show a sound legal basis for his conclusion. It is admitted that with the exception of *Whitaker v. Hawley*, 25 Kan., 674, all the adjudicated cases are contrary to that view. We need not, therefore, review the authorities. *Whitaker v. Hawley* does substantially support the opinion expressed by Commissioner RAGAN. Still, that case is, to a certain extent, distinguishable from the one at bar. The lease there involved was of real estate and personal property. It was accepted as the established rule that the destruction by accident of personal property terminates the lease, and the court held that the mere fact that rent had been reserved in gross for both classes of property would not prevent the operation of this rule. This, we think, was the consideration really governing the case. The argument goes rather to justify a surrender of the lease than an apportionment of the rent, leaving the lease otherwise in force. We think it will be conceded that a doctrine established by a long line of authorities, unbroken, except, partially, by a single case, should not be abandoned without substantial and controlling reasons. The reasons for its abandonment, as stated in Commissioner RAGAN'S opinion, we take it, are these: That a lease does not operate as a bargain and sale, but merely as a hiring of the use of the premises; that under section 53 of chapter 73, Compiled Statutes, the lease is to be construed according to the intent, without regard to technical rules of law; that the reasons given for the prevailing rule have failed because the landlord may now insure his interest; that the rule is unjust and contrary to the enlightened spirit of the nineteenth century. In the first place, we cannot agree that the effect of the lease is merely to pass to the lessee the use of the premises, without creating an estate. From time immemorial it has been considered that a lease passes the estate for the term, leaving in the lessor the reversion and rent issuing out of the demised term. We do not think that the statute referred to

changes this rule. It doubtless makes it competent for the parties, by appropriate language, to contract differently, but the statute is in this respect merely declaratory of the common law. As said by Lord Ashurst in *Doe v. Burt*, 1 Term R. [Eng.], 701: "The construction of all deeds must be made with reference to their subject-matter, and it may be necessary to put a different construction on leases made in populous cities from that on those made in the country." To give the statute as broad a construction as claimed would abrogate the rule in Shelley's case and many other settled principles of real estate law. It would make every mortgage a conveyance of the legal title, subject to strict foreclosure, and would render all bonds and penalties enforceable according to their terms. It is hardly too much to say that it would destroy nearly all general principles of contract law, and leave in force only those rules whereby the intention of the parties is to be determined. As to the argument that the landlord may insure, and that, therefore, there exists no longer the reason given for the prevailing rule, that it is but fair that the lessee should bear part of the loss, the answer is double. In the first place, the reason given can hardly be accepted as the true reason for the prevailing rule, and in the second place, while the landlord may insure, his insurance extends only to his reversionary interest, while the tenant has also an insurable interest and may protect himself against such a loss by insuring his term. Finally, it is not for the court to abrogate or to reform contracts because of apparent inequity or injustice in their provisions. If the nineteenth century has advanced in civilization so far as to require the disregard of established legal principles merely because they are antiquated, this modern enlightenment must certainly have extended so far as to justify a presumption that the parties to a contract have sufficient intelligence to anticipate probable disasters and provide therefor if they so desire. We think the reasons alleged are entirely insufficient to justify an innovation on established legal

principles. As we said before, rules settled by a long and uniform course of judicial decisions should not be lightly disregarded. This lease is couched in technical language which has uniformly been considered as creating an estate in the lessee for the term demised, and when the parties have resorted to such technical language it is to be presumed that it was intended in its technical sense. It is not the business of the courts to make new contracts for the parties, and we cannot see how we can enter here a judgment or decree continuing the lease at a rent different from that therein reserved without, in effect, making for the parties a new contract, different from that which they made for themselves. The lessee might have protected itself by a suitable provision against such a catastrophe. If insurance has anything to do with the case, it might have protected itself by insuring its term. There is technically no difference between the present case and the case of an outstanding estate for life, with a remainder or reversion over. In such case the destruction of improvements is a loss to be borne both by the particular tenant and the remainderman. The lessor cannot protect himself and secure his rent by rebuilding, because in the absence of a covenant he could not re-enter for that purpose without eviction. So that to hold that there should be an apportionment where the tenant is unwilling to permit a rebuilding would arbitrarily deny to the landlord any right to his whole rent. We think the law is exactly stated in a very exhaustive opinion by Willard, J., in *Coogan v. Parker*, 2 S. Car., 255, to the effect that where there is a substantial destruction of the subject-matter of the lease by act of God or the public enemy, the tenant may elect to rescind, and on surrendering shall be discharged from the payment of the rent; but unless he elect to rescind by surrender, or offer to surrender, he must pay the rent according to his covenant, and that in determining what amounts to a substantial destruction of the subject-matter the nature of the premises and the use which the

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parties intended should be made thereof are to be considered. This doctrine reconciles cases supporting the general rule announced with those holding that where a room in a building is let, and the building is destroyed, the rent is extinguished, because in such a case there has been a complete eviction or surrender. Where, however, there has been only a partial destruction, and the lessee sees fit to continue the lease and remain in possession, he must so do according to its terms and pay the rent reserved.

POST, C. J., and RYAN, C., concur in the foregoing dissenting opinion.

W. NISSEN v. J. E. TURNER.

FILED JANUARY 7, 1897. No. 6970.

Landlord and Tenant: RENT: TO WHOM PAYABLE. To an action for rent the defendant pleaded that he had been induced to enter into the lease by the plaintiff's falsely and fraudulently representing to him that he was the owner of the demised premises, whereas in fact he was not the owner and had no authority to lease the same; that thereafter the defendant had accepted a lease from and paid rent to the true owner. *Held*, Not to state a defense, there being no averment that the lessee had not entered into possession, or that he had been kept out of possession or evicted by the holder of the paramount title, or that he had surrendered the lease.

ERROR from the district court of Thurston county.
Tried below before NORRIS, J. *Affirmed*.

Jay & Beck and Guy T. Graves, for plaintiff in error.

J. M. Curry, *contra*.

IRVINE, C.

Turner sued Nissen to recover on two promissory notes executed by Nissen to T. C. Cabney and Francis Cabney

respectively, and alleged to have been indorsed by the Cabneys to Turner before maturity and for value. An amended answer filed by Nissen admitted the execution of the notes and averred that before their execution the Cabneys, intending to cheat and defraud Nissen, falsely represented to him that they were the owners of certain land in Thurston county, and had good right and lawful authority to lease the same; that Nissen, relying on said representations, leased said land for one year from and after January 19, 1892, and in consideration for said lease executed and delivered the notes sued on; that the Cabneys were not the owners of the land; had no authority to lease it, and that the land was in fact unallotted tribal land belonging to the Omaha Indians, and under the control of their council and the federal agent; that on the 24th day of June, 1892, the agent of said tribe, with the consent of its council, leased said land to Nissen and collected the rent in full; that the notes were therefore without consideration, and that Turner had full knowledge of the facts. To this answer a general demurrer was sustained and the defendant electing to stand on his amended answer, judgment was entered for the plaintiff. The defendant prosecutes error.

The judgment of the district court was right. It is no defense to an action for rent that the lessor was not the owner of the demised premises; and one who accepts a lease and enters into possession may not voluntarily attorn to an adverse claimant. It is true that if he be evicted under title paramount, he may defend on that ground against rent accruing after the eviction, and under certain circumstances he may surrender, but in order to discharge him from rent there must be either an eviction or an actual surrender. On the other hand, it is probably true that one who has entered into a lease with another may, in an action for the rent reserved, allege that he was prevented from entering by an adverse claimant in possession; or possibly, after having executed the lease, he may defend against the rent on the ground that before

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entry as the tenant of the lessor he learned of the existence of a superior title whereunder entry might be prevented or he might be evicted in case he entered. But this answer does not allege that Nissen did not enter under his lease. Nor does it allege that he had been evicted by the holder of the paramount title, nor that he had surrendered. We cannot supply the place of these averments by intendment. They are essential to complete the defense. The answer not containing them the demurrer was properly sustained.

AFFIRMED.

CHARLES CUMMINGS V. STATE OF NEBRASKA.

FILED JANUARY 7, 1897. No. 8681.

1. **Criminal Law: INTENT: EVIDENCE.** In a criminal case where the intention of the accused is a material fact, and he takes the stand on his own behalf, he may be asked directly what was his intention with regard to the act complained of.
2. ———: **INSTRUCTIONS.** An instruction in a criminal prosecution that if the jury should find the facts essential to establish guilt they should acquit, but if such facts had not been proven they should convict, is erroneous and ground for reversal, although it may be apparent to this court that the trial court unintentionally transposed the words "convict" and "acquit."

ERROR to the district court for Douglas county. Tried below before SCOTT, J. *Reversed.*

Mahoney & Smyth, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day*, Deputy Attorney General, for the state.

IRVINE, C.

The plaintiff in error was informed against for murder in the second degree. He was convicted of man-

slaughter and brings the case here through writ of error. The plaintiff in error was an employe in a drinking saloon and billiard room. The deceased, with several companions, was in the room and became involved in an altercation with the plaintiff in error, which resulted in the plaintiff in error's striking the deceased upon the head with a billiard cue, producing death. There was evidence tending to show that the blow was provoked by an attack made upon the plaintiff in error by the deceased. The plaintiff in error was sworn on his own behalf and was asked: "What intention did you have in striking back that blow at that time?" An objection to this question was sustained and the offer was made "to prove by the witness that he had the intention, and only the intention, of warding off the blow which was made at him, and to prevent what he believed to be a threatened repetition of it." The court then sustained the objection, saying: "The defendant can introduce all the facts tending to show the reason why he used that billiard cue, but he cannot give any secret thoughts he may have had in his mind as to the intent." This ruling is assigned as error.

In *Campbell v. Holland*, 22 Neb., 587, the action involved the issue as to whether a certain conveyance had been made to defraud creditors, and the court held that in such a case it is competent to inquire of the vendor whether, in making the transfer, he intended to delay or defraud creditors. *Jonasen v. Kennedy*, 39 Neb., 313, was an action for malicious prosecution, and it was held that it was competent to ask the defendant whether, in making the complaint, he acted with any malice toward the plaintiff. These cases were followed in *Laing v. Nelson*, 40 Neb., 252. If in a civil case where the intent of a party is material, it is competent to inquire directly of him as a witness in regard to such intent, we cannot see why it is not proper in a criminal prosecution. The defense here interposed was self-defense, and the intent and purpose of the plaintiff in error were material inquiries.

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Where such evidence is rejected, it is because it is hearsay or because it involves an inference which should be for the jury, and not the witness, to draw. Were it a generally accepted fact of science that a third person might, by his own senses, and not merely by the acts or words of another, ascertain the thoughts of that other, as we know by his senses he may ascertain his acts, it would certainly be competent to ask that third person to state the thoughts of the one under investigation, as he now details his acts. The statute making the defendant in a criminal prosecution a competent witness, there is certainly no reason why he may not testify to his own intent. That is on his part a matter of personal knowledge as much as the things he perceives through his organs of sense. Of course, on account of his interest in the result and the impossibility of contradicting him, such testimony may be entitled to very little weight, but this is a question for the jury. The evidence is admissible for whatever it may be worth.

The court gave the following instruction: "The facts necessary for the state to prove beyond a reasonable doubt to warrant a conviction of the crime charged, are, that Jed Vance once lived; that he is now dead; that at and within the county of Douglas and state of Nebraska, and at some time prior to the commencement of this prosecution, the defendant purposely, maliciously, and feloniously caused the death of the said Jed Vance by striking him on the head with a billiard cue; and that at some time within a year and a day thereafter said Jed Vance died from the effect of such blow. If these facts have been proven beyond a reasonable doubt you should acquit the defendant of the crime charged. If these facts have not been established by the evidence beyond a reasonable doubt, you should convict him of the crime charged." By this instruction the jury was told that it should acquit if the crime was proved and convict if it was not proved beyond a reasonable doubt. It is quite clear to us that the court, in giving this instruction, committed

merely a clerical error in writing it out, and unintentionally transposed the words "convict" and "acquit." But we can hardly presume, especially in a criminal case, that the jury could not thereby have been misled. Whatever the intent of the court was, the instruction as given to the jury was wrong.

For the errors indicated the judgment must be reversed.

REVERSED AND REMANDED.

TECUMSEH NATIONAL BANK, APPELLEE, v. JAMES D. RUSSELL ET AL., APPELLANTS.

FILED JANUARY 7, 1897. No. 6948.

1. **Constructive Trust: BANK STOCK.** The cashier of a bank used the bank's funds to purchase stock in another bank. *Held*, That a court of equity would charge the stock with a trust in favor of the bank whose funds were wrongfully used to purchase it.
2. **——: ———: BONA FIDE PURCHASER.** A third person claimed the stock by purchase from the cashier. Evidence set out in opinion *held* not to show that he was an innocent purchaser for value.
3. **Corporations: STOCK: COLLATERAL SECURITY: CONTRACTS: CANCELLATION.** Stock in a bank was issued to A, who pledged it as collateral security to a loan procured from another bank. The bank issuing the stock accepted a surrender of the certificate and issued a new one in its place to the cashier of the bank. *Held*, That it thereby waived any right it might have had to rescind its contract with the original holder and cancel the stock on the ground of fraud in its procurement.

APPEAL from the district court of Johnson county.
Heard below before BABCOCK, J. *Affirmed*.

T. Appelget, J. Hall Hitchcock, and Reese & Gilkeson, for appellants.

John H. Ames and S. P. Davidson, for appellee.

IRVINE, C.

The First National Bank of Sterling had issued to James D. Russell its certificate for fifty shares of its capital stock of the par value of \$5,000. Russell had been a member of the firm of Russell & Holmes, bankers at Tecumseh. The plaintiff, the First National Bank of Tecumseh, had succeeded to some extent to the business of Russell & Holmes, but the last named firm remained in existence for the purpose, at least, of closing out its late business. Russell & Holmes obtained a loan of \$5,000 from the Schuster-Hax National Bank of St. Joseph, Missouri, and pledged as security Russell's stock in the Sterling bank. The pledge was made by Russell's signing a blank assignment indorsed on the certificate and delivering it to the Schuster-Hax bank. The Schuster-Hax bank sent the certificate to the Sterling bank, caused the transfer to be entered, and the Sterling bank issued a new certificate in the name of S. A. Walker, who was cashier of the Schuster-Hax bank. The Russell & Holmes note to the Schuster-Hax bank was paid in installments, the last payment having been made February 15, 1892. This suit was begun by the Tecumseh National Bank, which alleged in its petition substantially the foregoing facts; and further, that the Russell & Holmes note to the Schuster-Hax bank had been paid out of the money of the Tecumseh National Bank by Russell & Holmes and by George D. Bennett, the cashier of the Tecumseh National Bank, at the request of Russell, and that the moneys of the Tecumseh National Bank had been wrongfully appropriated for that purpose without the consent or knowledge of its directors. The Tecumseh National Bank on these averments prayed for an order requiring the surrender of the certificate to the Tecumseh National Bank and for its sale in payment of the amount so used. Russell & Holmes answered alleging that their debt to the Schuster-Hax National Bank had been paid by Bennett at their request, and that in consideration of his pay-

ment of that debt they had sold to him the certificate. Bennett answered that he had paid the debt by drafts drawn by him as cashier on the funds of the Tecumseh National Bank, but that on the following day he repaid said sum; that Russell & Holmes had sold him the stock certificate and that he had thereafter, for a valuable consideration, sold the same to D. R. Bush. Bush intervened, and alleged, among other things, that he had purchased for value said certificate, and prayed that he be decreed to be the owner thereof. The First National Bank of Sterling answered alleging that Russell had procured the original certificate to be issued to him by false and fraudulent representations, and asked that it be surrendered for cancellation. The court found for the plaintiff and adjudged the ownership of the stock to be in the Tecumseh National Bank. It will be observed that three claims were asserted to the stock: First, that of the plaintiff derived through the alleged wrongful use of its funds by Bennett, its cashier, to pay the debt to the Schuster-Hax bank, to secure which Russell & Holmes had pledged the stock; second, the claim of Bush derived through an alleged purchase from Bennett, it being claimed that Bennett had derived title by purchase from Russell in consideration of his paying the Schuster-Hax note; third, the claim of the bank of Sterling, which issued the stock, that it was obtained in the first place fraudulently, and should therefore be canceled.

The general principles of equity jurisprudence discussed in the briefs, are, for the most part, well settled and call for no extended discussion. Such difficulty as lies in the case arises in the application of established principles to the somewhat complicated state of facts presented by the record. The theory of the plaintiff seems to be that by virtue of the payment of the Schuster-Hax notes out of its funds, it became entitled to be subrogated to the rights of the Schuster-Hax bank derived from the pledge of the stock to it. It is contended by Bush that no right to subrogation is established, because

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courts of equity only apply the doctrine of subrogation in two cases: First, in pursuance of an agreement of the parties to that effect; second, where the person paying the debt is legally obligated therefor, or where he is compelled to pay it to protect his own rights. It may be conceded that these propositions are correct, but Bush claims through Bennett, and Bennett claims through a contract of purchase whereby he became entitled to the stock in consideration of his paying the Schuster-Hax note. It is proved beyond controversy that Bennett, at this time, was the cashier of the Tecumseh bank and that he paid the note by means of checks and drafts drawn by him as cashier against the funds of that bank. The bank alleges that such funds were wrongfully and without its consent used for that purpose. This allegation stands practically admitted. It is met merely by the claim that Bennett replaced the money so drawn the following day. To state the evidence on this issue would unnecessarily complicate the case. Suffice it to say that we are satisfied that the finding of the trial court in favor of the plaintiff on this issue is sustained by the evidence, and it must be accepted not only that the Schuster-Hax note was paid from funds of the Tecumseh National Bank, but that that bank has not received repayment thereof. This branch of the case may then be simplified as follows: Bennett, the cashier, and in a sense the trustee of the Tecumseh bank, uses its funds for the purpose of purchasing Russell's stock in the Sterling bank. The legal title to the stock thereby passed to Bennett, but it having been purchased by a trustee with trust funds unlawfully used for that purpose, the *cestui que trust* may follow its funds. A court of equity, as long as they can be followed, will continue the trust. In opposition to this view Bush cites 1 Morse, Banking, sec. 173a, where it is said: "If the cashier embezzles funds of the bank and invests them, a court of chancery has no power to fasten a trust upon the investment, and to declare the cashier to be a trustee, holding what he has purchased in trust for the bank.

The mere fact that the cashier obtained the means of purchasing by a theft from the corporate funds, provided that he actually made the purchase in his own name and on his own account, does not create such a case of implied or resulting trust as to give jurisdiction to a court of equity for the purpose of taking possession of the purchased property and ordering that indemnification be made from it to the bank." The sole authority cited in support of that statement is *Pascoag Bank v. Hunt*, 3 Edw. Ch. [N. Y.], 583. While that case fairly supports the statement, it is directly contrary to the ruling of the same vice chancellor in *Bank of America v. Pollock*, 4 Edw. Ch. [N. Y.], 215, and we may add that we deem it directly opposed to the well settled principles governing similar cases. That the cashier of a bank is a trustee of its funds in his possession and by virtue of his office will hardly be contested, and that when a trustee uses trust funds to purchase other property the *cestui que trust* may, upon tracing the fund into that property, charge the trust upon the property so purchased, is now an equitable truism. We think, therefore, that the plaintiff made out such a case as to justify the finding in its favor, and to justify the decree rendered, unless one of the other parties showed a superior right.

Bush claimed to be a purchaser for value without notice of any rights on the part of the Tecumseh bank. But we do not think that he established this by proof. For reasons not necessary here to detail, the Schuster-Hax bank had refused to surrender the certificate at the time Bennett paid the note. Bush claims that he was the owner of a certificate of deposit in the former bank of Russell & Holmes; that in January, 1892, he made a contract with Russell whereby he was to surrender this certificate and accept in lieu thereof the stock certificate in controversy together with other collateral. He was then informed that the stock certificate had been pledged to the Schuster-Hax bank. He has not surrendered his certificate of deposit, so that he has parted with no portion

of the consideration of this agreement and is not a purchaser for value. Nor do we think he is a purchaser without notice. He now claims ownership by virtue of a written assignment, dated February 16, 1892, from Russell to Bennett, and one dated the following September, from Bennett to Bush. His transaction was with Russell. He knew the stock certificate was then held in pledge by the Schuster-Hax bank. The fact that he had to derive title through Bennett was sufficient at least to arouse suspicion, and in addition to this, the certificate was not produced, and both written assignments recited that the Schuster-Hax bank was still holding it, notwithstanding that the debt for which it had been pledged had been paid. We think these circumstances were sufficient to put him on inquiry which, if made, would have disclosed the controversy as to the ownership of the certificate. For these reasons his claim is not superior to that of Russell himself.

The case of the First National Bank of Sterling is based on the theory that Russell had been a stockholder in a bank whose assets the Sterling bank had bought and whose liabilities it had assumed; that among the assets so acquired was a note made by Russell; that the understanding was that should the assets of the former bank prove sufficient, stock would be issued to its stockholders by the bank of Sterling to represent the excess of assets so acquired; that the Sterling bank had issued the stock to Russell in consideration of his pledging collateral notes to secure his note held by that bank; that he had misrepresented the value of the collateral. Whether or not this is true we need not inquire, because the Sterling bank had recognized Russell's transfer of the stock to the Schuster-Hax bank by accepting a surrender of the certificate and issuing a new certificate to the cashier of the Schuster-Hax bank. It would also appear that the Sterling bank had elected to ratify the transaction by reducing its claim against Russell to a personal judgment. It had certainly waived any right to rescind the

contract and cancel the stock. The decree of the district court is in all things

AFFIRMED.

CAMPBELL PRINTING PRESS & MANUFACTURING COMPANY,
APPELLEE, V. MARDER, LUSE & COMPANY, APPEL-
LANT, ET AL.

FILED JANUARY 7, 1897. No. 6937.

1. **Summons: IMPEACHMENT OF RETURN.** In this state it is the settled law that extrinsic evidence is admissible to impeach the return of an officer as to service of process.
2. **Judgment: SERVICE OF SUMMONS.** Where there is an attempt at service reaching the defendant, but there is a defect in the manner of service or form of the return, this is a mere irregularity, and a judgment founded on such service is not open to collateral attack. But where the attempted service does not reach the defendant at all, a judgment founded thereon is absolutely void.
3. **Corporations: SERVICE OF SUMMONS.** Where attempt is made to serve a summons upon a corporation, and the persons served are not at the time officers of, or connected with, the corporation, the case is one of total absence of service, and a judgment founded thereon is void.
4. **Judgments: ENFORCEMENT: AVOIDANCE.** The rule whereby a party seeking affirmative aid of a court of equity to relieve him against a void judgment is required to disclose a meritorious defense to the cause of action does not apply in a case where the plaintiff is himself seeking affirmatively to enforce such judgment.
5. **Corporations: CREDITORS: ENFORCEMENT OF CLAIMS.** One corporation having acquired all the stock of another, and then, through its officers, having procured that other to execute to it a bill of sale of all its assets to secure an existing indebtedness, and there remaining as a consequence of such acts no officers or place of business or tangible assets of such second corporation, *semble*, that another creditor of the second corporation need not procure judgment against it preliminary to an action against the first for the purpose of enforcing its claim against the second.

APPEAL from the district court of Douglas county.
Heard below before FERGUSON, J. *Reversed.*

The facts are stated by the commissioner.

Connell & Ives, for appellant:

A judgment may be impeached on the ground of a lack of jurisdiction over the defendant by any one whose interests are adversely affected thereby, be he stranger or party defendant to the suit. (*Atkins v. Atkins*, 9 Neb., 191; *Frazier v. Miles*, 10 Neb., 113; *Murphy v. Lyons*, 19 Neb., 691; *Holliday v. Brown*, 33 Neb., 657; *Wilson v. Shipman*, 34 Neb., 573.)

To gain jurisdiction over a corporation the initial process must be served upon the identical persons and in the exact manner prescribed by the statute. (*Fee v. Big Sand Iron Co.*, 13 O. St., 563; *Miller v. Norfolk & W. R. Co.*, 41 Fed. Rep., 431; *St. Louis, V. & T. H. R. Co. v. Dawson*, 3 Ill. App., 120; *Great Western M. Co. v. Woodmas of A. M. Co.*, 12 Colo., 47; *Chambers v. King W. I. Bridge Mfg. Co.*, 16 Kan., 270; *O'Brien v. Shaw's Flat & T. C. Co.*, 10 Cal., 343.)

Breckenridge & Breckenridge and *L. F. Crofoot*, contra:

There was service of valid process by which the court acquired jurisdiction. (*Van Fleet*, Collateral Attack, secs. 61, 62, 526; *Black*, Judgments, sec. 287; *Freeman*, Judgments [4th ed.], 130; *Gandy v. Jolly*, 35 Neb., 711; *Schneitman v. Noble*, 75 Ia., 120; *Rotch v. Humboldt College*, 56 N. W. Rep. [Ia.], 658.)

Defective service of process does not render void a judgment based thereon. (*Isaacs v. Price*, 2 Dillon [U. S.], 351; *Hendrick v. Whittemore*, 105 Mass., 27; *Dutton v. Hobson*, 7 Kan., 196; *Campbell v. Hays*, 41 Miss., 561; *Christian v. O'Neal*, 46 Miss., 669; *Cole v. Butler*, 43 Me., 401; *Fahs v. Taylor*, 10 O., 105; *Ballinger v. Tarbell*, 16 Ia., 492; *Webster v. Daniel*, 47 Ark., 131; *Righter v. Thornton*, 30 W. L. Bull [Pa.], 32; *Jackson v. State*, 104 Ind., 516; *Essig v. Lower*, 120 Ind., 239; *Leonard v. Sparks*, 22 S. W. Rep. [Mo.], 899; *Janes v. Howell*, 37 Neb., 320; *Schoeder v. Wilcox*, 39 Neb., 136.)

Appellant, who is a stranger to the record of the judg-

ments, cannot attack them collaterally. (*Wilcher v. Robertson*, 78 Va., 602; *Vose v. Morton*, 4 Cush. [Mass.], 27; *Eureka Iron & Steel Works v. Bresnahan*, 66 Mich., 489; *Gilmore v. Ham*, 10 N. Y. Supp., 48; *Martin v. Bowie*, 37 S. Car., 102; *Connelly v. Edgerton*, 22 Neb., 82.)

IRVINE, C.

The Campbell Printing Press & Manufacturing Company, a New York corporation, brought this action against Marder, Luse & Co, which seems to be an Illinois corporation, and the Omaha Type Foundry, a Nebraska corporation, alleging in its petition the recovery by the plaintiff against the Omaha Type Foundry of four judgments before a justice of the peace, and one in the county court of Douglas county; and that executions issued on these judgments had been returned unsatisfied; that such judgments were upon promissory notes made by strangers to the type foundry and by it indorsed to the plaintiff; that at the time of the indorsement of said notes the type foundry had in its possession and was the owner of a large amount of property; that Marder, Luse & Co. was then the owner of a large portion of the capital stock of the type foundry, and thereafter became the owner of the rest of the stock, and thereupon took possession and appropriated to its own use all the property of the type foundry. The prayer was for a disclosure of the property of the type foundry and that it be applied to the payment of plaintiff's judgments and for judgment against Marder, Luse & Co. Marder, Luse & Co. answered denying the material averments of the petition and alleging that the type foundry, in February, 1891, became unable to continue its business because of inability to pay debts, and sold its property to Marder, Luse & Co., the latter paying full consideration therefor. The court found for the plaintiff, taking the view that the plaintiff was entitled to share *pro rata* with other creditors in the property of the type foundry, and rendered judgment against Marder, Luse & Co. for that proportion of its judgments

corresponding to the ratio which the value of the property bore to the total indebtedness of the company. From this decree Marder, Luse & Co. appeals.

The evidence, without contradiction, discloses that prior to December, 1890, the type foundry was doing business in Omaha with a capital stock of \$25,000, \$23,000 of which was owned by Marder, Luse & Co., \$1,000 by Mr. Pickering, and \$1,000 by H. P. Hallock. Mr. Hallock was vice president of the company, Mr. Marder, of Marder, Luse & Co., being its president. In December, 1890, Marder, Luse & Co. purchased the stock of Messrs. Pickering and Hallock, and thus became the sole owner of the stock of the type foundry. Mr. Dresser appeared then as the agent of Marder, Luse & Co. and took possession of the property of the type foundry. It appears quite clearly that he held no official position in the type foundry corporation and exercised no authority derived therefrom. The type foundry had about this time executed a bill of sale to Marder, Luse & Co. of all its property in payment of an indebtedness previously incurred. This bill of sale was authorized at a meeting of the stockholders of the type foundry, the minutes disclosing that Mr. Marder was alone present representing all the stock. From that time, to-wit, early in February, 1891, the property was in the possession of Dresser as agent for Marder, Luse & Co. under the bill of sale. The judgments were all rendered in actions begun in 1892, long after the transactions referred to. To their introduction in evidence the defendant objected, on the ground of want of jurisdiction appearing on the face of the record, and also by extrinsic evidence. The court received the judgments and found in the decree that they were valid. We think they were shown beyond dispute to be void. It is unnecessary to consider some of the questions argued as to the validity of service upon certain officers of the corporation. Where the returns show by name the person upon whom service was made, it appears in each case to be Mr. Hallock or Mr. Dresser. At the time of service Mr. Hallock had no

connection whatever with the corporation, and Mr. Dresser never had any connection therewith. One record discloses service by leaving a copy at the usual place of business of the corporation. But the action was before a justice of the peace. The general provision of the Code of Civil Procedure is (sec. 73), that a summons against a corporation may be served upon certain officers named, "or if none of the aforesaid officers can be found, by a copy left at the office or last usual place of business of such corporation." But section 912 of the Code is a special provision relating to service upon corporations in actions before justices of the peace, and such special provision prevails as against the general provision of section 73. By section 912 it is provided that a summons may be served upon certain officers, "or if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation with the person having charge thereof." Now, at the time this summons was served, the type foundry had no usual place of business, and no person was in charge thereof. The section governing the case differs from section 73 in requiring service at the usual place of business instead of last usual place of business, and in requiring a copy to be left with the person having charge thereof. While it was held in *Johnson v. Jones*, 2 Neb., 126, that the return of an officer cannot be impeached collaterally, it has since been several times distinctly held to the contrary. (*Holiday v. Brown*, 33 Neb., 657, 34 Neb., 232; *Wilson v. Shipman*, 34 Neb., 573.) In many other cases the court, by considering the sufficiency of evidence to impeach the return, has impliedly held to the same effect, and it now must be accepted as the established law of this state that extrinsic evidence is admissible in a collateral proceeding for the purpose of impeaching an officer's return. We call attention to this rule for the purpose of showing the inapplicability of certain authorities from states holding otherwise, which authorities are relied on by the appellee.

The appellee contends, however, that although it be

found that the service was defective, the judgments are not void, and not open to collateral attack. In support of this argument reliance is placed largely on *Gandy v. Jolly*, 35 Neb., 711. In that case the defect was that the service had been by reading the summons instead of delivering a copy. This was a mere irregularity in the manner of service and the court properly held that it did not rendered the judgment void. A paragraph from Black on Judgments, was, however, cited with approval in the opinion, distinguishing between such irregularities in the manner of service and a total want of service which renders the judgment void, and as illustrations of cases where there is a total want of service there is mentioned service by delivering a copy to a third person not a resident of the house of defendant's abode, and service upon a stranger, although he is the authorized agent of the defendant. The distinction is in fact clear. If an attempt at service is made, and actually reaches the defendant, although it be not made or returned in the form and manner required by law, there is presented a case where jurisdiction attaches so far as to render a judgment good against collateral attack. But where the attempted service does not reach the defendant at all there is no service and the proceedings are void. We consider this a case of the latter class. Service was not made upon any person having any connection whatever with the corporation. Indeed, at the time the suit was begun, the corporation was practically extinct. It had no officers, no place of business, and a solitary stockholder which was itself a corporation of a distant state. We therefore think the court erred in finding the judgments valid. Attention is called to *Janes v. Howell*, 37 Neb., 320. But that case is not applicable. It belongs to that class in which the court has frequently held that one seeking the affirmative relief of a court of equity against a void judgment must disclose that he has a meritorious defense to the cause of action on which the judgment was based. These cases are not applicable to cases like the present, where the party claiming under

the judgment is seeking affirmatively to enforce it. This he cannot do if the judgment is void.

The plaintiff, both in its petition and in its evidence, rested its case entirely on the judgments. While the pleading of the judgments was perhaps an implied pleading of an indebtedness, there was in the evidence no proof of an indebtedness to the plaintiff outside of the records of the void judgments. Therefore, the plaintiff failing to establish its judgments, failed entirely to establish its relationship as creditor of the type foundry. We mention this particularly for the purpose of guarding against any inference that the plaintiff is entitled to no relief if it be in fact a creditor. The bill of sale to Marder, Luse & Co. was clearly void as against other creditors. It has been held that a corporation may not prefer a debt owing to its own directors, or a debt for which such directors are sureties. (*Ingwersen v. Edgecombe*, 42 Neb., 740; *Tillson v. Downing*, 45 Neb., 549.) The principle which governs these cases applies to such a case as this, where, if we concede that one corporation may become the owner of all the stock of another, the officers of the former, acting in its behalf and also on behalf of the latter, prefer a debt from the latter to the former, especially when such preference absorbs all the assets of the debtor corporation. It may be that the situation at the time was such that the plaintiff could not maintain any action against the type foundry because of the disappearance of its whole organization and of all its assets through the wrongful act of the defendant. If so, it is very probable that this action might be maintained against Marder, Luse & Co. without its being sustained by judgments against the type foundry. As the record does not, at this time, present these questions, they are not decided. We merely desire to clearly indicate that they are not here being determined adversely to the plaintiff. Under the circumstances, we think the proper course is to remand the action to the district court for a new trial.

WILLIAM M. CLARK V. WILLIAM J. TURNER ET AL.

FILED JANUARY 7, 1897. No. 6857.

1. **Wills: PROOF OF CONTENTS.** The contents of a lost will cannot be proved solely by the declarations of the testator.
2. ———: ———. The testimony of a witness as to the contents of a will, his knowledge being derived from the testator's reading the will to him, and not from having himself inspected it, is in effect only testimony as to the testator's declarations.
3. ———: ———. Such declarations, it seems, are admissible to corroborate more direct evidence.
4. ———: **CONTEST: ATTORNEYS' FEES.** Attorneys' fees cannot be allowed in the contest proceedings to unsuccessful proponents of a will. If such proponents are entitled to reimbursement out of the estate, it must be had in the course of administration, and after administration granted.

ERROR from the district court of Lancaster county.
Tried below before HALL, J. *Affirmed.*

See opinion for statement of the case.

J. W. Dewcese, F. M. Hall, and G. M. Lambertson, for plaintiff in error:

Proponents had a right, after having shown that a will was left by testator and that it had been lost, stolen, or destroyed, to prove its contents by offering what purports to be a copy, to show that it is a copy, and to have the same probated. (*In re Page*, 118 Ill., 576; 1 Redfield, Wills, 349; *Davis v. Sigourney*, 8 Met. [Mass.], 487; *Crowley v. Crowley*, 80 Ill., 469; *Jackson v. Vickory*, 1 Wend. [N. Y.], 406; *Dan v. Brown*, 4 Cow. [N. Y.], 483; *Doran v. Mullen*, 78 Ill., 342; *Thornton v. Thornton*, 39 Vt., 122; *Sugden v. Lord St. Leonards*, 34 L. T. Rep. [Eng.], 372; *Southworth v. Adams*, 11 Biss. [U. S.], 257.)

The presumption that a will is revoked because not found in the place where it was deposited by the testator may be rebutted. (*Gaines v. Hennen*, 24 How. [U. S.], 553.)

The presumption of revocation does not arise when no immediate search was made for the will in the place where it was last seen and deposited, and this is especially true where those interested in its loss or destruction took the receptacle in which it was deposited into their exclusive possession and custody, against the known wishes of the testator, and prevented the executors, legatees, and devisees in the will from examining it until its contents were rifled and destroyed by an alleged burglar. In such a case the burden of proof is on the contestant, who took possession of the receptacle, to show that the will was not in it at the time he took the receptacle into his custody. (*Finch v. Finch*, 16 L. T. Rep. [Eng.], 268; *Podmore v. Whatton*, 3 Su. & Tr. [Eng.], 449; *Sugden v. Lord St. Leonards*, 34 L. T. Rep. [Eng.], 372; *In re Page*, 118 Ill., 576; *Gaines v. Hennen*, 24 How. [U. S.], 553.)

Fees of proponent's attorneys, as well as costs of court, ought to be paid out of the estate. (*Seebrook v. Fedawa*, 33 Neb., 413; *Mathis v. Pitman*, 32 Neb., 191; *Bradford v. Boudinot*, 3 Wash. [U. S. C. C.], 122; *Compton v. Barnes*, 4 Gill [Md.], 55; *Henderson v. Simmons*, 33 Ala., 291.)

Sawyer, Snell & Frost, and Charles O. Whedon, contra:

There was no competent testimony as to the contents of the will alleged to have been made by Dr. Turner. (*Edington v. Mutual Life Ins. Co.*, 67 N. Y., 185; *Fecney v. Long Island R. Co.*, 5 L. R. A. [N. Y.], 544; *Pennsylvania R. Co. v. Marien*, 7 L. R. A. [Ind.], 687; *Heuston v. Simpson*, 115 Ind., 62; *Westor v. Aetna Ins. Co.*, 99 N. Y., 56; *Loder v. Whelpley*, 111 N. Y., 239; *Parker v. Carter*, 6 Am. Dec. [Va.], 513; *Morris v. Cain*, 1 So. Rep. [La.], 797; *Bacon v. Frisbie*, 80 N. Y., 394; *Root v. Wright*, 84 N. Y., 72; *Koontz v. Owens*, 18 S. W. Rep. [Mo.], 928; *Ransom v. Schmela*, 13 Neb., 73.)

The contents of the alleged will could not be shown by the declarations of testator. (*Chrisholm v. Ben*, 7 B. Mon. [Ky.], 412; *Colligan v. McKernan*, 2 Dem. [N. Y.], 421; *Mercer v. Mackin*, 14 Bush [Ky.], 442; *Clark v. Morton*, 28

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Am. Dec. [Pa.], 670; *Gay v. Gay*, 14 N. W. Rep. [Ia.], 238; *Waterman v. Whitney*, 11 N. Y., 157; *Boynlan v. Meeker*, 28 N. J. Law, 274; *Behrens v. Behrens*, 25 N. E. Rep. [O.], 209; *Morgan v. Burrows*, 45 Wis., 211; *Woodward v. Goulstone*, 11 App. Cas. [Eng.], 478; *Hunter v. Gardenhire*, 13 B. J. Lea [Tenn.], 662.)

The contents of the alleged will was not shown by that positive testimony required by law. (*Southworth v. Adams*, 11 Biss. [U. S.], 260; *Davis v. Sigourney*, 8 Met. [Mass.], 487; *In re Johnson's Will*, 40 Conn., 589; *Bauskett v. Keitt*, 22 S. Car., 187.)

The ruling in disallowing fees for attorneys was correct. (*Mumper's Appeal*, 3 Watts & S. [Pa.], 441; *Royer's Appeal*, 13 Pa. St., 569; *Andrews v. Administrators*, 7 O. St., 152; *Collyer v. Collyer*, 4 Dem. [N. Y.], 53; *Brown v. Vinyard*, 1 Bailey's Eq. [S. Car.], 460.)

IRVINE, C.

John J. Turner was an elderly citizen of the city of Lincoln, blessed with a pious disposition and a considerable quantity of this world's goods. He died March 1, 1890, leaving him surviving two sons, William J. Turner and R. Morris Turner. Some time after his death William M. Clark and Nahum S. Scott propounded for probate what purported to be a copy of John J. Turner's last will and testament, it being alleged that said will had been deposited in a valise belonging to the testator, which, after his death, had been delivered to his sons, and that thereafter it was claimed that the house in which the valise had been kept was burglariously entered, the valise cut open, and its contents extracted. The probate was contested by the two sons. The result of the proceedings in the county court does not appear from the record. The case was, however, appealed to the district court, where, as a result of what appears to have been a third trial there, a verdict was rendered in favor of the contestants. Judgment was rendered denying probate and the proponent Clark, the proponent Scott hav-

ing died pending the proceedings, prosecutes to this court proceedings in error to reverse that judgment.

The copy of the will, as propounded, is as follows:

"I, John J. Turner, of Lincoln, Nebraska, being of sound and disposing mind and memory, aged —, do hereby declare this to be my last will and testament, as follows:

"First—I will that my debts and reasonable funeral charges be paid.

"Second—I give and bequeath to the Board of Missions for Freedmen of the Presbyterian Church of the United States of America the value of the note of R. Morris Turner for four thousand five hundred dollars, secured by mortgage on lot three (3) in block one hundred and twenty-nine (129), city of Lincoln, Lancaster county, Nebraska, less two thousand dollars borrowed at the First National Bank of Lincoln, Nebraska, and paid over to said board.

"Third—I give and bequeath to the Board of Foreign Missions of the Presbyterian Church in the United States of America the value of a note made by William J. Turner to me for the sum of five thousand seven hundred dollars, less the amount necessary to pay my note of \$2,000 at the First National Bank of Lincoln, Nebraska, for which this note of \$5,700 dollars is pledged as collateral security.

"Fourth—I give and bequeath to Karen Rootham the entire use of my double house on North Twelfth street, east of the university, during her natural life, and in case the house shall be destroyed she may use the entire amount of the insurance to rebuild the same, or she may receive one-half of the amount of the insurance and release her interest and claim upon the property. She may assign and dispose of her entire interest in rents and use of said house at any time, and at her death the said property shall go to my two sons, William J. Turner and R. Morris Turner.

"Fifth—I give, grant, and bequeath to my son, R. Mor-

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ris Turner, the house and lot where I now reside, with all the furniture and family library therein; also any balance of the note of R. Morris Turner not bequeathed or paid at the time of my death.

"Sixth—I give and bequeath to my son, William J. Turner, all my medical books, instruments, and medicines, books of account, and accounts belonging to me at the time of my death.

"I hereby constitute and appoint Captain N. S. Scott and William M. Clark to be the executors of this my last will and testament, hereby revoking all former wills by me made.

"Witness my hand and seal this — day of —, 1888.

"JOHN J. TURNER.

"FRED SCHMIDT.

"GEO. A. HAGENSICK.

"The foregoing instrument was on the day of the date thereof signed, sealed, published, and declared by the testator therein named, John J. Turner, as and for his last will and testament, in the presence of us, who, at his request and in his presence, and in the presence of each other, have hereunto subscribed our names this — day of —, 1888.

FRED SCHMIDT.

"GEO. A. HAGENSICK,

"CODICIL TO MY LAST WILL AND TESTAMENT.

"I, John J. Turner, hereby will and direct that my executors shall pay to my brother, living in —, out of the interest of William J. Turner's note the sum of three hundred and fifty dollars, to be used by him as a loan for the term of five years, without interest. At the expiration of five years to be collected and paid over to the Board of Foreign Missions of the Presbyterian Church in the United States of America.

JOHN J. TURNER.

"Dated December —, 1889.

"Witness:

"SARAH TURNER.

"KAREN ROTHAM."

A few remarks in regard to the subject-matter of the testator's property may not be inappropriate, preliminary to the statement of other facts in the case. The alleged testator, John J. Turner, referred to usually in the evidence as Dr. Turner, by which term we shall hereafter designate him, was, at the time of his death, and at the time it is claimed this will was executed, seized of the land described in the will, and also of another lot in the city of Lincoln, not thereby disposed of. He had previously owned two other lots in the city of Lincoln, one of which he had conveyed to his son, R. Morris Turner, receiving in consideration for the conveyance the latter's note for \$4,500, secured by mortgage on the lot. The other lot he had, at about the same time, conveyed to his son, William J. Turner, receiving in return the latter's note for \$5,700. It appears from the evidence that the object of both these conveyances was to provide annuities by virtue of an arrangement entered into between Dr. Turner and his sons, whereby, in order to relieve the doctor of the burden of caring for the property, the conveyances were made to his sons, they to pay interest on the notes during the doctor's lifetime. They contend that upon his death interest was to cease, and the principal of the notes was not to be paid. These are the notes referred to in the second and third paragraphs of the will propounded. Dr. Turner's wife died in 1883. Soon thereafter one Karen Rootham, or, as she herself signs her name, Karenhappech Rootham, a maiden of mature years, became installed in Dr. Turner's home as his housekeeper. It is to her that the fourth paragraph of the alleged will relates. Mr. Clark and Mr. Scott, who are named as executors, were prominent members of the Presbyterian church, of which Dr. Turner was also a member. Captain Scott was a lawyer and seems to have been Dr. Turner's legal adviser. Dr. Turner seems to have acquired somewhat of a habit of making wills, as there is evidence, chiefly from entries in his diary, of his having executed several such instruments in the last

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decade of his life. There is a little evidence of this character tending to show the execution by him of a will later than the one here in controversy, but this evidence would not be of such a character as to justify the rejection of this will were this one satisfactorily established. It is claimed that the will propounded was executed in the summer of 1888, and it quite satisfactorily appears that Dr. Turner during that summer did execute a will, which was witnessed by Fred Schmidt and George A. Hagensick. Neither witness pretends to have been informed as to the contents of the will. There is evidence to the effect that on one occasion, and perhaps on three occasions, between the time when this will was executed and Dr. Turner's death, the doctor exhibited to Miss Rootham an envelope, and also, without displaying its contents, a paper enclosed in that envelope, telling Miss Rootham that it was his will and calling her attention to the fact that he deposited it in a certain valise, which he hung in a closet in his house. He also placed the key to the valise in a drawer and called her attention to that fact. He left with her an envelope marked "Miss Karen Rootham (after my death). J. J. Turner." This envelope when opened contained a direction to Miss Rootham "To give my valise key to Mr. William Clark, who can take the note case, which contains all valuable papers, also any money in my old book, and the key of the house to my son, R. Morris Turner." Mr. Clark was unfortunately absent from Lincoln at the time of Dr. Turner's death. Immediately after his funeral the two sons of Dr. Turner found Miss Rootham in possession of the valise. At their solicitation she, exhibiting some reluctance, delivered the valise to William J. Turner, both sons giving her a written receipt therefor. The valise was placed in William J. Turner's house. Early in May it was announced that this house had been entered by burglars and a number of articles abstracted. The account of this affair as given by William J. Turner, and corroborated in most particulars by his wife and brother, is that with his

family he made an evening call upon his brother and returned home about half past ten. During his absence the house had been entered through a basement window; some jewels had been stolen; this valise had been cut open and papers, evidently abstracted therefrom, were found scattered about the floor; no will was found among these papers. From the foregoing facts we think the proponents raised a strong presumption, if they did not make conclusive proof, that a will by Dr. Turner had been executed; that it was placed in the valise, and that it was there at the time of his death. Without desiring to cast any unfavorable reflection upon any of the parties concerned, we may be, perhaps, permitted the remark that the unusual conduct of the burglar in seeking out this valise from an upstairs closet, cutting it open, and scattering its contents over the floor, does not tend in our minds to raise any inference that no will was among the papers so abstracted, although it does not appear that any paper belonging to Dr. Turner, and known to be in existence, was actually carried away by the felon. In addition to the foregoing, there appeared certain declarations of Dr. Turner extending to a short time before his death, from which it would appear that the will had not been revoked. Such declarations we think admissible for this purpose, as will be hereinafter indicated.

The difficulty lies in the proof which was offered as to the contents of the will. It does not appear that any person ever read the will, or was aware of any portion of its contents except through statements made by Dr. Turner. The strongest evidence is that of Captain Scott, to the effect that Dr. Turner came to his office declaring that he had made his will, and then read it to Captain Scott, asking him whether it was in legal form. Captain Scott was blind and therefore did not see the will himself, so that his testimony amounts to nothing more than a repetition of Dr. Turner's declarations as to its contents. In addition to this there is evidence of a few declarations made to others subsequently as to the effect of different

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provisions contained in the will. Dr. Turner told Mr. Clark that he and Captain Scott were named as executors. He told Karen Rootham that he had provided for her; he told his pastor, Dr. Curtis, something in regard to the bequests to the two missionary boards; beyond this there is no evidence as to the contents of the will. Mr. Clark had, about the time the will was executed, obtained copies of the two notes referred to. Just before the will was propounded for probate he obtained from the records a description of the property covered by the Morris Turner mortgage. The copy propounded was made up by Captain Scott's dictating to Mr. Clark from recollection of Dr. Turner's declarations, and Mr. Clark's filling in the description of the notes and mortgage from the memoranda in his possession. The attestation clause was copied from a form book. We do not think that this was sufficient evidence of the contents of the will, and from this it follows that the verdict was the only one which could properly be returned upon the evidence. It becomes, therefore, unnecessary for us to consider any special assignments of error relating to other branches of the case.

The precise question does not seem to have often arisen. We think all the cases hold that the declarations of a testator may be received in evidence to prove the existence of a will and in proof of issues relating to the testator's competency or to undue influence, but it has been doubted whether such declarations may be received to establish a revocation. It follows that in all proceedings to probate a lost will, such declarations are admissible in evidence because the existence of the will must necessarily be established by some such indirect method. The declarations having been admitted for that purpose their sufficiency to establish the contents of the will is another question.

In England, prior to the leading case of *Sugden v. Lord St. Leonards*, L. R., 1 P. D., 154, it was considered that the declarations were not admissible as tending to

prove the contents. *Doe v. Palmer*, 16 Q. B. [Eng.], 747, turned upon the question whether an interlineation had been made before or after the execution of the will, and it was held that the testator's declarations as to his intentions made before the execution of the will were admissible, but the declarations made after its execution were not. *Quick v. Quick*, 3 Swab. & T. [Eng.], 442, was a case startlingly like that at bar in some points. The sole evidence of the contents of the will was the testator's declaration. There was the same fact of the will being kept in a bag and of its being taken by burglars. The court held that there was a failure of proof, holding also that the declarations were incompetent. The court of appeals, however, in *Sugden v. Lord St. Leonards*, overruled *Quick v. Quick* and distinctly held such declarations admissible. The will in question was, however, proved by much other evidence; Miss Sugden, the testator's daughter, had not only heard the will read but she had herself read it a number of times and was able to testify in much detail as to its contents from such personal inspection; moreover, not less than eight codicils were found, the terms of these all tending to corroborate her as to the contents of the original will. In addition to this proof there was the evidence of the testator's declarations as to the will's contents. The long and exhaustive opinions are directed only incidentally to the admissibility of the declarations. The crucial question having been whether all the evidence was sufficient to establish the will, the case, therefore, falls far short of holding that the contents of a lost will may be proved solely by the declarations of the testator. Its effect is merely that such declarations are admissible to corroborate more direct evidence. This is the construction given the case by the house of lords in *Woodward v. Goulstone*, 11 App. Cas. [Eng.], 469, where the declarations of the testator were held insufficient alone to establish the will. An intimation was given that *Sugden v. Lord St. Leonards* was not considered free from doubt and the question there

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presented left open. The importance of interests involved in probate cases in England is such that the decisions of English courts on such subjects are entitled to great weight, and we may safely say that the result of the English cases is that the contents of a lost will cannot be established solely by the declarations of the testator, although such declarations are now deemed admissible for the purpose of corroboration.

The American cases relied on to support proponents' theory are, when examined, in strict accordance with the English rule. *In re Page*, 118 Ill., 576, expressly follows *Sugden v. Lord St. Leonards*, and comes within the true doctrine of that case, because the declarations in that case merely went to corroborate the testimony of the lawyer who drew the will and who produced a copy thereof. *Southworth v. Adams*, 11 Biss. [U. S.], 256, *In re Hope*, 48 Mich., 518, and *In re Lambie*, 97 Mich., 49, are cases of the same character, the declarations being corroborative merely, and not relied on in themselves to establish the will. In *Colligan v. McKernan*, 2 Dem. [N. Y.], 421, a will had been propounded for probate. It was contended that there was a subsequent will revoking the former one, but the subsequent will was lost. The evidence offered to establish the second will consisted in the testimony of a clerk in a lawyer's office, who heard the scrivener read it in the presence of the testator at the time of its execution. The court distinctly held that this testimony was merely hearsay, relating, in fact, to the scrivener's declarations, and was not equivalent to testimony by one who had himself read the will. In *Clark v. Morton*, 5 Rawle [Pa.], 235, the supreme court of Pennsylvania held that the contents of a will cannot be established by declarations of the testator, in the absence of the *corpus* of the will and of all evidence that the witness had himself seen it. The court said that to permit a will to be so established would defeat the object of the statutes requiring wills to be written. In *Chisholm's Heirs v. Ben*, 7 B. Mon. [Ky.], 408, the testimony was of the same

character as in this case. The will had been read by the testator to the witness, and there were subsequent declarations by him as to its contents. The court rejected this evidence as insufficient. *Mercer's Administrators v. Mackin*, 14 Bush [Ky.], 434, reaffirms *Chisholm v. Ben*. The argument has been frequently advanced that such declarations are admissible as self-dis-serving declarations of a decedent. *Mercer v. Mackin* and *Clark v. Morton* discuss this proposition, but demonstrate that such declarations are not admissible on that ground. *Chisholm v. Ben*, *supra*, intimated that on adequate proof that the will had been fraudulently suppressed by the heirs, the evidence referred to might be sufficient by virtue of the maxim "*Omnia præsumentur contra spoliatores*." This maxim is not easy to apply. It has sometimes been held to justify the production of slighter proof than would otherwise be required. Its most frequent application is for the purpose of allowing secondary evidence. It would certainly be very dangerous to extend it so far as to relieve a party charged with proving the contents of a written instrument from all obligation to produce some evidence of a competent character; but this phase of the case was not submitted to the jury by any instruction given or asked, at least so far as the contents of the will are concerned. The general verdict for the contestants precludes us from examining the evidence on this point on the theory that spoliation by the contestants was established. The policy of the statute of wills, like the statute of frauds, is that it is better that occasional injustice should be done, in exceptional cases, through a failure of legal proof, than that transactions within the statutes should in all cases be left to the uncertainties of parol evidence. So the courts in giving effect to the statutes should pursue the same policy, and should avoid meeting hard cases by adopting rules which, generally applied, would defeat the object of the legislature. On no subject, perhaps, are statutes so strict in requiring a writing executed and attested in certain forms as in

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the case of wills, and while it is firmly established that a lost will may be proved by secondary evidence, the courts have always required such evidence to be direct, clear, and convincing. As said by the supreme court of the United States in *Lea v. Polk County Copper Co.*, 21 How., 493: "Courts of justice lend a very unwilling ear to statements of what dead men have said." Such evidence is always considered dangerous, and subject to the closest scrutiny. We think it would be in the highest degree dangerous, and would be violative of the object and spirit of the statute, should we hold that the existence and contents of an alleged will might be established solely by testimony of the testator's declarations. Notwithstanding *Sugden v. Lord St. Leonards* and the other cases in that line, we believe the language of the court of appeals of Kentucky in *Chisholm v. Ben* remains true: "The books of reports contain many cases in which wills lost or destroyed have been offered for probate upon parol or other secondary evidence of their contents, and many in which such wills were established, but in an examination of these cases, as extensive as opportunity would allow, we have found none in which there does not seem to have been the evidence of witnesses who knew, or might be presumed to have known, the contents of the will from their own inspection; none in which the declarations or even professed reading of the decedent have been held to be alone sufficient on this point; and none which would sanction their admission upon the question of the contents of the will with any other effect than as merely corroborative of the more direct evidence." As already indicated, this view leads to affirmation of the judgment, because the verdict was the only one warranted by the evidence.

An application was made for the allowance of attorneys' fees to the proponents. This application the district court denied, and the ruling is assigned as error. In two cases such an allowance has been made on behalf of defeated contestants when the will was admitted to

probate. In *Seebrook v. Fedawa*, 33 Neb., 413, the allowance seems to have been made on the ground that there were reasonable grounds for contesting the will. In *Mathis v. Pitman*, 32 Neb., 191, the allowance was based on the construction of sections 42 and 44 of chapter 20, Compiled Statutes, the latter section providing that in appeals in probate matters, if it shall appear that the appeal was taken vexatiously or for delay, the court shall adjudge the appellants to pay the costs, including an attorney's fee to the adverse party. It seems to have been the opinion of the court that this language involved the alternative that if the appeal be not taken vexatiously or for delay, the costs shall be taxed to the estate. The record before us does not show which party appealed to the district court. In *McClary v. Stull*, 44 Neb., 175, such an application was denied, the court remarking, however, that "courts of equity have frequently assumed, when dealing with funds brought directly within their control, to order payment therefrom of fees to counsel for the adverse party." Both in *Mathis v. Pitman* and in *Seebrook v. Fedawa* the will, as a result of the proceeding, was admitted to probate and administration established, the parties charged with administering the estate being before the court, so that the fund may be said to have been "brought directly within the control" of the court, according to the statement in *McClary v. Stull*. This feature appears in all the cases from other states cited by the proponents. Thus, *Henderson v. Simmons*, 33 Ala., 291, was decided on the final accounting of an administrator, the question arising in the administration of the estate and not in the proceeding leading to the probate of the will. In *Compton v. Barnes*, 4 Gill [Md.], 55, the will had been probated and letters testamentary granted to the executors. The contest was by means of a caveat thereafter filed, and the holding of the court was that the will having been probated and letters testamentary granted, it became the duty of the executors to defend the will, under which they were already acting, and that they

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were, therefore, entitled to compensation. In *Bradford v. Boudinot*, 3 Wash. [U. S. C. C.], 122, the facts were the same and the proceeding was by original bill, after the will had been defeated, for an accounting against the executor, who had qualified in pursuance of its probate. The court held that he was not an executor *de son tort*, and was, consequently, entitled to reimbursement for his expenses in defending the will. We can find no instance where no administration had been granted and unsuccessful proponents of a will have been allowed counsel fees out of the estate in the contest proceedings. Inasmuch as the statute (Compiled Statutes, ch. 23, secs. 137 and 138) makes it the duty of persons named as executors to propound the will for probate, and provides a penalty for neglecting to do so, it seems reasonable that they should not be compelled to perform this duty at the peril of incurring the expense thereof against themselves should probate be denied, at least where they have acted in good faith. But we are satisfied that in this case no allowance can be made. The judgment simply denies probate. No administration is granted and we have not before us any person now charged with the duties or powers of a personal representative of the deceased, nor has by this proceeding the estate itself been impounded. If such application be proper, it should be made in the county court after administration shall have been granted.

JUDGMENT AFFIRMED.

A. J. BEHREND'S V. FREDERICK BEYSCHLAG.

FILED JANUARY 8, 1897. No. 6917.

1. **Instructions: ASSIGNMENTS OF ERROR.** Alleged errors in giving instructions must be specifically assigned in the motion for a new trial. Where made in gross and any one of the instructions is determined to be without error, the whole assignment will be overruled

2. ———: REPETITIONS. It is not error to refuse to give an instruction where its subject-matter has been embraced in the charge to the jury.
3. Sales: DELIVERY: PAYMENT. A contract of sale of corn stated the price and also the time and place of delivery, but did not provide specifically time, place, or manner of payment. *Held*, That delivery and payment were to be concurrent acts, and the vendor could insist on payment in cash or money, in the strict sense of the term "current funds."
4. ———: ———: ———. *Held further*, That it was not necessary for the vendee to have had, at any one time or on any one day of the time assigned for the delivery of the corn, sufficient money at the place of delivery to pay for all the corn, the subject of the contract. It was sufficient if, during the whole of such time, he was able, willing and ready to pay for the corn in the manner contemplated by the contract, if delivered.
5. Bill of Exceptions: STIPULATION FOR ALLOWANCE. A stipulation in the terms, "It is hereby agreed that the clerk of the district court sign this bill of exceptions, instead of the judge who presided at the trial of this case," *held* sufficient to authorize the party therein designated to sign and settle the bill of exceptions; that the words "this bill of exceptions," in such stipulation, were equivalent to an agreement that the document to which the stipulation was attached was a true bill of exceptions.
6. ———: AUTHENTICATION. To entitle a bill of exceptions to consideration in this court it must be authenticated by the certificate of the clerk of the trial court identifying it as the bill of exceptions.

ERROR from the district court of Nemaha county.
Tried below before BABCOCK, J. *Affirmed*.

E. W. Thomas and A. J. Burnham, for plaintiff in error.

John S. Stull, *contra*.

HARRISON, J.

The defendant in error commenced this action in the district court of Nemaha county to recover of plaintiff in error the amount which he claimed had become his due as damages by reason of an alleged breach of a contract of sale of some corn, by the failure, on the part of plaintiff in error, to deliver the corn. The contract of sale, as pleaded, was as follows:

"NEMAHIA CITY, NEB., March 23, 1891.

"This is to certify that I have this day sold to F. Beyschlag, to be delivered at Johnson, Nebraska, three or four thousand bushels of good merchantable white corn, at fifty-two cents per bushel, to be delivered within fifteen days from date, March 23, 1891.

"(Signed)

A. J. BEHREND'S."

An answer was filed for plaintiff in error which contained a general denial, and certain affirmative statements of matters in regard to transactions alleged to have occurred in respect to the sale of the corn, between the plaintiff in error and an agent of defendant in error, and of other facts relied on as constituting defenses to the cause of action pleaded in the petition, but which need not be quoted or stated in substance. A reply was presented for defendant in error, and as a result of a trial the defendant in error was awarded a verdict and judgment. Of the proceedings during the trial the plaintiff in error now asks a review.

The first alleged error to which attention is directed in the brief filed for plaintiff in error is that instruction numbered 9, prepared and requested by defendant in error and read to the jury, was incorrect and should not have been given. The portion of the motion for a new trial in which complaint in relation to this instruction was contained reads as follows: "Because the court erred in giving the following instructions requested by plaintiff, to-wit: Instruction No. 1, instruction No. 4, instruction No. 5, instruction No. 6, instruction No. 7, instruction No. 8, instruction No. 9, instruction No. 10." The instruction numbered 1, to which reference was made in the branch of the motion for new trial which we have just quoted, was correct, as were some others in the list set out. As the assignment was not separate and specific but *en masse*, and one or more of the instructions referred to have been determined to be without error, the assignment is unavailing and is overruled.

It is urged that the court erred in refusing to give in its charge to the jury instructions numbered 2 and 6 prepared and presented in behalf of plaintiff in error. The instructions last mentioned were as follows:

"2. The jury are instructed that Behrends was not bound to deliver the corn at the time and place named in the contract unless he received the pay therefor in money and in cash. He was under no obligation to take therefor a check, or draft, or anything that was not legal tender money. He was entitled to receive such pay immediately on delivering the corn."

"6. The court instructs the jury that if you find from the evidence that plaintiff was not ready, and willing, and able to pay for 3,000 bushels of corn at Johnson at the time fixed for the delivery thereof by the contract, then defendant was not bound to deliver the corn at that place, and in that event your verdict should be for defendant."

Of the one of these instructions numbered 6, suffice it to say that the matter embraced in its terms had been fully and completely covered in other instructions given in the charge of the court to the jury, hence there was no error in the refusal to read it. (*Beavers v. Missouri P. R. Co.*, 47 Neb., 762.) By the instruction numbered 2 requested to be given for the plaintiff in error, and refused by the court, it was sought to impress upon the minds of the jury the idea that no delivery of the corn as contracted was necessary unless payment for it was made in money, in the strict meaning of the term, or would follow its delivery. The same proposition was embraced in an instruction prepared and presented on the part of the plaintiff in error, and read by the court to the jury, as a portion of the charge. By it the information was conveyed that if the evidence disclosed that in the event plaintiff in error had taken the corn to the place and at the time designated for delivery, and the vendee was not able, willing, and ready at such time and place to pay

therefor "in cash," the verdict should be for plaintiff in error. The word cash, used in the connection in which it appears in the instruction thus given, could have or be given no other meaning than that of coin, or current money as opposed to payment in any other manner, as by check or draft, etc. The contract of sale of the corn did not in terms provide for payment in any particular manner or medium, nor when nor where payment was to be made, and it must be construed that delivery of the corn, and payment therefor, were to be concurrent acts, and doubtless the plaintiff in error, had he delivered the corn, would have been entitled to receive payment for it in cash, or currency, money in the strict meaning of the term, and not by either check or draft, unless he chose to do so. (*Walters v. Reed*, 34 Neb., 544.) But it was not obligatory upon the defendant in error to have had, during all the days assigned by the contract for the delivery of the corn, or any one of such days, an amount of money in Johnson, the place of delivery, necessary to pay in full for all the corn of which the sale to him was contemplated by the contract. "It was sufficient * * * that he was able and ready to make payment if the corn had been delivered." (*Mount v. Lyon*, 49 N. Y., 552.) The court having given instructions on the subject of payment, and in what it should be made, if, by delivery of the corn, payment had become the vendor's due, it did not err in its refusal to read to the jury the instruction numbered 2, proffered by plaintiff in error.

It is contended by counsel for defendant in error that there is no bill of exceptions in this case; that what purports to be such bill was not signed and settled by the judge who presided at the trial of the cause, but was signed by the clerk of the district court, he being without authority for such action. What appears in the record as a bill of exceptions was not signed by a judge, but was signed by a clerk of the district court, presumably pursuant to the following stipulation:

"It is hereby agreed that the clerk of the district court sign this bill of exceptions instead of the judge, who presided at the trial of this case.

"Dated this 5th day of March, 1894.

"A. J. BURNHAM AND

"E. W. THOMAS.

"Attorneys for Defendant.

"JOHN S. STULL,

"Of Counsel for Plaintiff."

Counsel for both parties having signed the foregoing stipulation, must be held to have adopted and approved the fair construction of its terms, and we think it not a strained meaning, but the fair import, of the phrase "this bill of exceptions" to be that the document to which it had reference was in fact what it was designated, the bill of exceptions; that this was in fact an agreement that it was the bill of exceptions; that this was sufficient, viewed as an agreement, to bring it within the requirements of section 311 of the Code of Civil Procedure, wherein it is stated: "Where the parties interested shall agree upon the bill of exceptions (and shall have attached a written stipulation to that effect to the bill), it shall be the duty of the clerk to settle and sign the bill." (*Fire Ass'n of Philadelphia v. Ruby*, 49 Neb., 584.)

It is further contended in this connection that the bill of exceptions was not authenticated by the certificate of the clerk of the district court as required by law, and hence is not entitled to consideration. The certificate of the clerk of the court, attached to the record, is as follows: I, Ed. Juel, clerk of the district court in and for said county and state, do hereby certify that the foregoing is a true and compared copy of the complete record in the case of Frederick Beyschlag v. A. J. Behrends, as the same appears of record in Complete Record 15, pages 586 to 596, inclusive, and also of the instructions given and instructions refused (they being inserted in the transcript in their proper order), as the same appears

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on file in my office." There is no reference in the certificate, of which the foregoing is a copy, to the bill of exceptions, as it is no part of the complete record in a case in the district court. (See Code of Civil Procedure, sec. 446.) The bill of exceptions was not authenticated and thus identified by the clerk of the district court, hence was not entitled to be considered in this court. (*Felber v. Gooding*, 47 Neb., 38; *Romberg v. Fokken*, 47 Neb., 198; *Romberg v. Hediger*, 47 Neb., 201; *Wood Mowing & Reaping Machine Co. v. Gerhold*, 47 Neb., 397.) It follows that the judgment of the district court must be

AFFIRMED.

JOHN O. YEISER V. HUGH LOWE.

FILED JANUARY 8, 1897. No. 6909.

1. **Divorce: ACTION FOR ATTORNEYS' FEES.** Under section 12, chapter 25. Compiled Statutes, the allowance of attorney's fees to the counsel of the wife is ancillary to or an incident of the action for divorce, and a separate suit cannot be maintained against the husband by such attorney to recover for his professional services therein rendered to the wife.
2. **Attorneys' Liens: ENFORCEMENT.** An attorney's lien cannot be enforced where there is not anything to which such lien can attach.

ERROR from the district court of Douglas county.
Tried below before OGDEN, J. *Affirmed.*

John O. Yeiser, pro se.

Osborn & O'Hanlon, contra.

NORVAL, J.

John O. Yeiser is an attorney at law, and as such he was employed, in 1891, to commence and prosecute a suit for divorce and alimony in the district court of Burt county by Eliza Jane Lowe against her husband, the

defendant herein. Mr. Yeiser instituted such suit for the wife on August 6, 1891, and on the 17th day of the same month the defendant filed an answer denying each and every allegation of the petition, except the marriage of the parties. On August 28, 1891, Mr. Yeiser filed in the case a claim for lien for services in the sum of \$1,000, but the defendant had no notice thereof until more than a year afterwards. Application was made in the cause for alimony *pendente lite*, which was overruled. Subsequently, on September 10, 1891, Mr. Yeiser, at the request of his client, drew an unconditional dismissal of the case, which was filed in court and the action dismissed. Plaintiff brought this action against the husband to recover for his legal services rendered in the divorce proceeding. From a judgment for the defendant, plaintiff prosecutes error.

The record shows that the defendant never employed plaintiff or agreed to pay him for his services; that the dismissal of the divorce suit was not the result of any settlement between the husband and wife, or collusion between them. She received nothing from her husband as a condition of withdrawing the action, nor did he ever promise to give her anything therefor. It does not appear that the grounds stated in the petition for divorce were true. The main question in the case is whether, under the facts disclosed by this record, defendant is liable in an action at law to an attorney for services rendered to the wife of the former in prosecuting the action for divorce. We do not think that he is. In an action for divorce, under section 12, chapter 25, Compiled Statutes, it is competent for the court to "require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency * * * and award execution for the same." This section of the statute was construed in *Burnham v. Tizard*, 31 Neb., 781, and it was held that the allowance of attorney's fees to the wife's counsel is only ancillary to or an incident of an action for divorce, and a separate suit cannot be main-

tained therefor by the attorney; in other words, that the remedy given by statute is exclusive. This principle is sustained by the weight of authority. (Schouler, Domestic Relations, sec. 91; Bishop, Marriage & Divorce [4th ed.], sec. 391; *Williams v. Monroe*, 18 B. Mon. [Ky.], 518; *Clarke v. Burke*, 65 Wis., 359; *Wing v. Hurlburt*, 15 Vt., 614; *Shelton v. Pendleton*, 18 Conn., 417; *McCullogh v. Robinson*, 2 Ind., 630; *Coffin v. Dunham*, 8 Cush. [Mass.], 404; *Morrison v. Holt*, 42 N. H., 478; *Ray v. Adden*, 50 N. H., 82; *Dow v. Elyster*, 79 Ill., 256; *Pearson v. Darrington*, 32 Ala., 229.) There are some cases holding that such an action may be maintained, but most of them were not decided under statutes like ours, and we refuse to follow their lead. As to whether an attorney who commences an action for a divorce for a wife against her husband can maintain a separate suit against the husband for his services in case the divorce proceedings are dismissed by collusion of the husband, we are not called upon to express an opinion, as no such question is presented by the record.

It is strenuously insisted by the plaintiff that at common law a husband is liable for necessities furnished his wife, and that the common law of England is in force in this state; hence the law implies a promise on the part of the husband to pay plaintiff for the legal services rendered to the wife. The fallacy of this argument is in the conclusion drawn from the premises stated. True, a husband, while the marriage relation exists, is liable for necessities provided the wife; but the professional services of plaintiff were not "necessaries" within the common-law meaning of that term. As said by the supreme court of Connecticut in *Shelton v. Pendleton*, 18 Conn., 417, a case like the one at bar: "The common law defines 'necessaries' to consist only of necessary food, drink, clothing, washing, physic, instruction, and a competent place of residence." This definition is not broad enough to include counsel fees, such as were sought to be here recovered. (See cases heretofore cited in this opinion.)

The next contention is that the defendant is liable to plaintiff for the amount of his claim against the wife by reason of the filing in the divorce case the notice of lien already mentioned. Section 8, chapter 7, Compiled Statutes, declares: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment, upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party." This statute, on compliance with its provisions as to notice, gives an attorney a lien upon the papers and funds in his possession belonging to his client, and upon moneys of his client in the possession of the adverse party in a cause in which the attorney was professionally employed. There was not anything to which an attorney's lien could here attach. Plaintiff held no papers or money belonging to Mrs. Lowe, nor was any money due his client in the hands of Mr. Lowe. Had the court in the divorce case made an order requiring the defendant to pay a sum as temporary alimony and attorney's fees, and before the payment therefor, but after notice of Mr. Yeiser's claim for lien, the divorce proceedings, by collusion between the parties, had been dismissed, *Aspinwall v. Sabin*, 22 Neb., 74, might apply. The question there involved does not arise here.

The views which we have stated make it unnecessary to discuss the alleged errors in the giving and refusing of instructions, since in no view of the case can the action be maintained. The judgment is

AFFIRMED.

OMAHA FIRE INSURANCE COMPANY V. ELIAS CRIGHTON.

FILED JANUARY 8, 1897. No. 7011.

1. **Trial: MEMORANDA BY JURORS: REVIEW.** In a suit on a fire insurance policy to recover the value of a large number of insured articles destroyed the court permitted jurors, during the trial, to make memoranda of such articles and the value placed thereon by the evidence. *Held*, That the court did not abuse its discretion.
2. **Insurance: MISREPRESENTATIONS: EVIDENCE.** The insured was unable to read and write, and the representations made by him to obtain the insurance were reduced to writing by the agent of the insurance company. *Held*, (1) Whether the insured made the representations written in the policy was a question of fact for the jury; (2) that the insured was not bound by any representation written in the application which he did not make.
3. ———: ———: ———. Evidence examined, and *held* to sustain the finding of the jury (1) that the insured did not represent that his household goods were, at the date of his application for insurance, in the building mentioned in said application; (2) that there was no representation in the written application that said goods were at said time in said building.

ERROR from the district court of Hall county. Tried below before THOMPSON, J. *Affirmed*.

W. H. Thompson and Jacob Fawcett, for plaintiff in error.

W. A. Prince, *contra*.

RAGAN, C.

This is an action on a fire insurance policy, brought in the district court of Hall county by Elias Crighton against the Omaha Fire Insurance Company, hereinafter called the insurance company. Crighton had a verdict and judgment and the insurance company prosecutes here a petition in error.

1. Of the errors assigned by the insurance company we notice the following: On the trial of the case, at the request of counsel for Crighton, the court permitted the jurors to make memoranda of the various articles testi-

fied to have been destroyed by the fire. This is the first assignment argued which we notice. We cannot say that this action of the court was prejudicial to the insurance company. A large number of articles were testified about. The number of these articles and the values placed upon them it would be almost impossible for the average man to remember without a memorandum, and we think that it was a matter resting in the discretion of the trial court to permit or not the jurors in this case to make the memoranda complained of. We are aware that in *Cheek v. State*, 35 Ind., 492, it was held that a jurymen must register the evidence on the tablets of his memory, and not otherwise; but that was a murder trial, and during its progress two of the jurors made notes of the evidence. To this the defendant on trial objected at the time, and the jurors were instructed by the court to desist from making notes. This they refused to do, and the supreme court said that their conduct was sufficient to entitle Cheek to a new trial; but the case was not reversed because of this conduct of the jurors. But in *Indianapolis & St. L. R. Co. v. Miller*, 71 Ill., 463, it was said that a juror of his own motion might make memoranda of evidence or of points in the argument, but the court said that a juror should not do this at the instance of counsel. We do not lay down any rule upon the subject, but content ourselves with holding that in this case the district court did not abuse its discretion in permitting jurors to make memoranda of articles testified about during the progress of the trial.

2. Crighton made a written application to the insurance company for the policy issued. This application, so far as material here, was as follows: "Application of Elias Crighton * * * for insurance against loss or damage by fire or lightning, * * * according to the specifications below, for the term of five years from the 23d of May, 1893: On one-story shingle roof frame building occupied by insured as dwelling, nothing; household furniture while in said dwelling, \$300; farm machinery

while on farm, \$480; horses and mules, wherever they be, \$600; hay and grain on cultivated land, \$25; hay press and horse-power on premises, \$175; * * * situate on the southwest quarter of section nine (9), township ten (10), range eleven (11)." As a defense to the action the insurance company pleaded that by this application Crighton represented to it that he was the owner of the one-story frame shingle roof building situate on the land described, and that the household goods insured were then in said building; that such representations were false, made by Crighton for the purpose of deceiving the insurance company, and were believed in and relied upon by it. The reply of Crighton met this defense by denying that he represented that he was the owner of the building situate on the property described; and denied that he represented to the company that the household goods were then in said building, but alleged that he was illiterate and unable to read and write; that the agent of the insurance company wrote the application and that he, Crighton, told him at the time that the household goods were then in some tents, but that in a few days he intended to move them into the house on the piece of land mentioned. On this issue the court instructed the jury to the effect that since the oral statements of the application for insurance were reduced to writing by the agent of the insurer, parol evidence was admissible to show that the application did not correctly recite the oral representations made. The giving of this instruction is the second assignment of error argued here. The court did not err in giving this instruction. In *State Ins. Co. v. Jordan*, 29 Neb., 514, it was held that where the insured was unable to read and write, and the application was made out by the agent of the insurance company, that if the agent wrote in the application statements different from those made by the insured, the latter was not bound thereby.

3. A third assignment is that the court erred in giving paragraph No. 6 of its instructions. The substance of

that instruction was that if the insurance company's agent had knowingly written in the application statements not made by the insured, and was now insisting upon these representations as a defense to the policy, that the insurer's conduct amounted to an attempted fraud, and that it was a question of fact for the jury to determine, from all the facts and circumstances in evidence, whether the application contained the representations made by the insured. The criticism made upon this instruction is that there was no evidence in the case to which it could be applied; but this is a mistake of counsel. The evidence is undisputed that the insured was unable to read and write; that he made his representations and statements orally to the agent of the insurance company, and that such agent made out the application already alluded to, and the insured testified positively that he told the insurance agent that the household goods insured were at that time in tents, and not in the building mentioned in the application, but that he intended in a few days to remove such household goods into that building. The evidence further shows that he did remove his household goods into that building, and that they were there long before the fire occurred, and the application shows on its face that the insured did not ask or obtain any insurance on the building, and it would require a strained construction to make the application a representation of the insured that he owned that building or that the household goods were then in it. The language of the application is that the insured desires insurance upon the household goods while they are contained in the building, but there is in the entire application no express representation either that the insured owned the building or that the goods were then in it.

4. Another argument is that the verdict of the jury is contrary to instruction No. 1 given by the court at the request of the insurance company. There is no merit whatever in this contention. By that instruction the court told the jury, in substance, that if they found from

the evidence that the insured, in his application, represented to the insurance company that his household goods and furniture were then in the building, that the building was then occupied by him, and that he made these representations for the purpose of obtaining the insurance on the household goods and other insured property; that the insurance company believed in and relied upon these representations, and that they were false, then they should find for the insurance company. By its verdict the jury found that the insured did not represent in his application that he was the owner of the building, did not represent that the household goods were then in the building, and the evidence supports this finding. The instruction properly submitted the issue to the jury, and its finding is not contrary either to the evidence or the instruction.

5. The insurance company requested the court to instruct the jury as follows: "You are instructed that the application and policy introduced in evidence should be considered together as forming the contract sued on in this case." The court modified it as follows: "And should be both considered together, in arriving at your verdict, in connection with all the other evidence in the case," and as thus modified gave the instruction. This action of the court is assigned for error. We do not think it was. If the court had given the instruction without the modification it would have been error, as it would, in effect, have told the jury that they should determine what contract existed between the insured and the insurer by considering only the policy and the written application, whereas one of the issues in the case was whether the application signed by the insured was the one he made; whether the representations in that application were the representations he made.

6. Another argument is that the court erred in instructing the jury as follows: "To constitute fraud a knowledge of the misrepresentations must rest with the party making it, and the representations must be made with the intention that the other party shall act upon it, and it

must also appear that the other party did act upon it to his injury." The criticism upon this instruction is directed to the last three words in it, to-wit, "to his injury." We think the criticism without merit. In order for the representation to be actionable, it must have been made with reference to an existing fact; it must have been false; the party must have relied and acted upon it. The words "to his injury" add nothing to the instruction as applied to the facts in this case. If the representations made by the insured in this case were false, if they were relied and acted upon by the insurance company, they were acted upon to its injury, because by acting upon them it issued the policy, which it would not have issued had it been aware of the falsity of the representations.

7. Finally, it is insisted that the verdict is not supported by sufficient evidence. We think it is, and we further think that the entire defense to this action is technical in the highest degree. The whole defense is predicated upon the fact that at the time the policy was issued the household goods insured were not at that moment or that day in the dwelling mentioned in the application. The evidence shows that these household goods were not destroyed by fire. They are not the subject-matter of this action, and long before the fire occurred the household goods insured were placed in the house mentioned in the application, and the literal interpretation of the application and the policy is that the insurance company insured these household goods only while in the building. The judgment of the district court is right and is

AFFIRMED.

MARYOTT & MCHURRON V. LEVI F. GARDNER.

FILED JANUARY 8, 1897. No. 6969.

1. **Judgment Without Finding.** A judgment that is not based on a finding, either general or special, is erroneous, though not for that reason void.
2. **Review: RETAINING CASE FOR TRIAL.** Where a judgment of a county court is reversed by a district court in a proceeding in error, the district court may retain such cause for trial.

ERROR from the district court of Thurston county.
Tried below before NORRIS, J. *Affirmed.*

Guy T. Graves and Jay & Beck, for plaintiffs in error.

John T. Cathers and J. M. Curry, contra.

RAGAN, C.

Maryott & McHurron recovered judgment in the county court of Thurston county against Levi F. Gardner. From this judgment Gardner prosecuted an error proceeding to the district court, where the judgment of the county court was reversed. To reverse the judgment of the district court Maryott & McHurron prosecute a petition in error here.

1. Gardner, in his petition in error filed in the district court, alleged that the judgment of the county court was erroneous for several reasons,—among others, that no finding of fact was made by the county court or a jury on which the judgment of said court was based. We shall assume that the district court reversed the judgment of the county court on this ground and proceed to the consideration of the question whether it erred in so doing. The transcript of the proceedings had in the county court, certified to the district court, contained the following: “1 o’clock P. M. Case called. Plaintiff appeared and waived a jury. Defendant refuses to appear further. Said case was submitted to the court. H. L.

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Maryott was sworn in behalf of the plaintiff and testified that there is due the plaintiff, and wholly unpaid, the sum of \$790.47. It is therefore considered by me that the plaintiff have and recover of the defendant the sum of \$790.47, with interest from July 1, 1893, and costs of suit, taxed at \$13.40." Section 297 of the Code of Civil Procedure provides: "Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding except generally for the plaintiff or defendant," etc. It will be seen that the county court made no finding in favor of the plaintiffs in whose favor it awarded a judgment; and a judgment that is not based on a finding, either general or special, is erroneous. (*Sprick v. Washington County*, 3 Neb., 253.) In *Ransdell v. Putnam*, 15 Neb., 642, it was held: "When an action at law is tried to a court without a jury, the finding of fact by such court is a substitute for, and stands in lieu of, a verdict of a jury, and need be no more specific than the verdict of a jury upon the same pleadings and evidence." In *Foster v. Devinney*, 28 Neb., 416, it was held that a finding of the facts put in issue must be made by the trier thereof in order to sustain a judgment rendered in favor of one of the parties. To the same effect see *Rhodes v. Rhodes*, 31 Neb., 848.

Counsel for plaintiff in error insist that notwithstanding the failure of the county court to make either a general or special finding, its judgment was not void. We entirely agree with that contention. (*McNamara v. Cabon*, 21 Neb., 589; *Black v. Cabon*, 24 Neb., 248; *Coad v. Read*, 48 Neb., 40.) The judgment of the county court under consideration is not void, but it is erroneous, and therefore voidable in this, a direct proceeding to set it aside. We must not be understood as holding that a judgment that is not based on a finding is void and would not be given full effect in a collateral proceeding. It must also be remembered that we are not reviewing the judgment of the county court, but the judgment of the district court reversing the judgment of the county

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court because not based upon a finding, and we simply hold that in so doing the district court was right.

2. The judgment of the district court was as follows: "It is therefore considered by the court that said judgment be, and the same is hereby, reversed at the costs to the present time of defendants in error, and it is ordered that said cause be retained for trial and judgment; pleadings to be filed as in case of appeal." It is now argued that this judgment of the district court is erroneous, as it is insisted that the jurisdiction of the district court went no further than to reverse the judgment of the county court and remand the cause to that court for further proceedings. Section 601 of the Code of Civil Procedure is as follows: "When the proceedings of a justice of the peace are taken on error to the district court, * * * and the judgment of such justice shall be reversed or set aside, the court shall render judgment of reversal, and for the costs that have accrued up to that time, in favor of the plaintiff in error, and award execution therefor; and the cause shall be retained by the court for trial and final judgment as in cases of appeal." The statute does not expressly provide that in case an error proceeding is prosecuted to a district court from a county court and the judgment of the latter reversed, the district court may retain the case for trial; nor is there any provision of the statute requiring such case to be remanded; but section 26, chapter 20, Compiled Statutes, provides: "In civil actions brought under the provisions of this chapter [probate courts] either party may appeal from the judgment of the probate court or prosecute a petition in error, in the same manner as provided by law in cases tried and determined by justices of the peace." Construing these two statutes together, we think that where a judgment of a county court is reversed by a district court in a proceeding in error the district court may retain such cause for trial. There is no error in the record and the judgment of the district court is

AFFIRMED.

GARDNER W. CLOSSON V. CHARLES J. ROHMAN.

FILED JANUARY 8, 1897. No. 8047.

Review: AGREED ABSTRACT. In a case submitted under rule 2, on an agreed printed abstract, the court will not look beyond the abstract; and, in order to a reversal of the judgment below, error must affirmatively appear from the abstract itself.

ERROR from the district court of Lancaster county.
Tried below before TIBBETS, J. *Affirmed.*

William B. Price, for plaintiff in error.

A. G. Greenlee, *contra.*

IRVINE, C.

This case was submitted under that portion of rule 2, which provides that a cause may be submitted at any time upon a written stipulation of the parties on printed briefs accompanied by, or containing, an agreed printed abstract of the record and evidence upon which the case is to be determined. On examination it is found that the parties have complied with the rule only by printing in one of the briefs the agreed statement of facts upon which the case was determined in the district court. This statement refers to a chattel mortgage in controversy, which was evidently before the district court as part of the evidence, but this mortgage is not preserved in the abstract. The correctness of the judgment may, and probably does, depend upon the terms of this mortgage, and as we cannot, in a case submitted under this rule, look beyond the printed abstract, we must presume the missing evidence was such as to justify the judgment.

AFFIRMED.

NEBRASKA LOAN & TRUST COMPANY, APPELLEE, v.
GEORGE H. BARNES ET AL., APPELLANTS.

FILED JANUARY 8, 1897. No. 6975.

Confirmation of a foreclosure sale was resisted on the ground that a copy of the appraisal had not been filed before the sale was advertised. The date of the appraisal and of the copy, the clerk's filing mark, and the return of the sheriff showed that the appraisal was made and filed before the advertisement. *Held*, That the fact that the certificates of incumbrances bore a later date was not alone sufficient to establish falsity of the record in other respects.

APPEAL from the district court of Phelps county.
Heard below before BEALL, J. *Affirmed*.

F. G. Hamer, for appellants.

John A. Casto and *J. B. Cessna*, *contra*.

IRVINE, C.

This is an appeal from an order confirming a sale pursuant to a decree foreclosing a mortgage. The only reason urged in the brief of the appellants against the confirmation of the sale is that a copy of the appraisal was not filed until after the sale was advertised. The only evidence in support of this contention is that the certificates of incumbrances in the record are dated subsequent to the advertisement. As against this evidence we have the appraisal itself dated prior to the advertisement, and the copy of the appraisal dated prior thereto, and bearing a filing mark by the clerk showing that it was filed on the day of its date. There is also the return of the sheriff to the order of sale wherein he states that on the 31st day of August, 1893 (which was prior to the advertisement), the appraisal was made and that he forthwith deposited a copy thereof with the clerk of the district court, and thereupon advertised the

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sale. The order of the court confirming the sale must be taken as a finding in favor of the appellee. The only evidence being the dates on the papers, we cannot say that the dates appearing in the certificates of incumbences are correct and that those appearing on the appraisal itself, the sheriff's return, and the clerk's filing mark, are wrong.

AFFIRMED

JOSEPH H. NASH V. JAMES A. COSTELLO.

FILED JANUARY 19, 1897. No. 7784.

1. **Bill of Exceptions: MOTION TO QUASH: LACHES.** A motion to quash a bill of exceptions on the ground that it was not presented to the adverse party or his attorney for examination and amendment within the statutory period should be made within a reasonable time after the bill is filed in the appellate court, and where not made for nearly eighteen months after the filing of the transcript, and after briefs upon the merits have been printed and served by the respective parties, such objection will be considered waived.
2. ———. *Horbach v. City of Omaha*, 49 Neb., 851, distinguished.

MOTION by defendant to quash bill of exceptions. *Motion overruled.*

W. A. Prince, for the motion.

Abbott & Caldwell and W. T. Thompson, contra.

PER CURIAM.

This cause is submitted to the court on a motion of defendant to quash the bill of exceptions, because not presented to him either within the time fixed by law or the order of the court. A trial in this case was had at the May term, 1894, of the district court of Hall county, and judgment rendered in favor of the defendant. On the 5th day of August, 1894, the court adjourned *sine die*, and

eighty days in all were given to reduce the exceptions to writing. The draft of the proposed bill of exceptions was submitted to the defendant's attorney for correction on January 22, 1895, who made thereon the indorsement, "Atty's for defendant refuse to consider same, because not presented and submitted within statutory time," and signed the same and returned the proposed bill to plaintiff's attorneys. This objection was overruled by the trial judge, and the bill was allowed on a showing that the delay in presenting the bill to defendant resulted solely from the failure of the official court reporter to make a transcript of the evidence until said date.

The contention of counsel for defendant is that the decision on the motion is controlled by *Horbach v. City of Omaha*, 49 Neb., 851. In that case it was ruled that the delay in presenting a bill of exceptions to the adverse party, caused solely by the fault of the official stenographic reporter in preparing the transcript of the evidence, will not authorize the submission of the bill after the expiration of the time limited by the statute or fixed by the order of the trial judge. The doctrine is sound and has been followed in *Trumble v. Trumble*, 50 Neb., 332. It does not follow that the motion to quash the bill in this case should be sustained, or that *Horbach v. City of Omaha* controls the decision herein. In that case the motion to quash was made in this court within a few days after the appeal was docketed, and before either party had filed briefs upon the merits of the controversy. Not so in the case before us. The transcript and petition in error were filed with the clerk of this court June 3, 1895. Two days later the brief of plaintiff was filed. On September 11, 1895, defendant's brief on the merits was served upon adverse counsel, and the first objection made to the bill of exceptions in this court was by the motion to quash, which was filed December 31, 1896, or nearly a year and a half after the proceedings in error were commenced and the briefs of the respective parties upon the issues presented by the petition in error were printed and

filed. These facts constitute a waiver of the objection that the bill of exceptions was not submitted to the defendant for examination and amendment within the time fixed by law, if such objection can be waived, and we entertain no doubt of it. This court has repeatedly so held. (*Omaha & N. N. R. Co. v. Redick*, 14 Neb., 55; *Cattle v. Haddox*, 14 Neb., 59, 527; *Cheney v. Cooper*, 14 Neb., 413; *Smith v. Kaiser*, 17 Neb., 184; *Yates v. Kinney*, 23 Neb., 648; *Warren v. Brown*, 31 Neb., 10; *Crane Bros. Mfg. Co. v. Keck*, 35 Neb., 683.) In *Yates v. Kinney*, *supra*, there was a motion to quash the bill of exceptions on the ground, among others, that it was not presented to the judge within the time required by law, which motion was filed more than a year after the docketing of the cause in this court, and after the plaintiff in error had prepared and presented his briefs on the main issues. The court held said objection was thereby waived, and in doing so used this language: "In a number of cases decided by this court it has been held that objections to a bill of exceptions must be made at the earliest opportunity, otherwise they will be waived. * * * Where, however, a party intends to raise objections to some matter of form connected with the preparation of a bill, he should file his objection within a reasonable time, and before the adverse party has been permitted to incur the expense of preparing and printing a brief relating to the merits of the controversy. Good faith requires this, and that objections to the form of the bill not thus raised shall be considered as waived. The objections to the preparations and signing of the bill, not having been made until more than a year from the date of filing the transcript in this court, and after the case was set down for hearing and the plaintiff in error had prepared and printed his briefs, come too late and are, therefore, waived." To this same effect is the decision in *Crane Bros. Mfg. Co. v. Keck*, *supra*.

It is true, as already suggested, the objection that the proposed bill was not presented for examination in time was made before the same was signed by the judge. This

step was indispensable to save the objection for the consideration of this court, in case it was afterwards insisted upon. The objection not having been seasonably renewed in this court, it must be treated as waived. This holding does not in the least conflict with the cases in which this court, of its own accord, has refused to consider bills of exceptions allowed by the clerk of the district court without a proper stipulation, signed by the parties, authorizing him to do so, or bills which have not been authenticated by the clerk of the trial court, notwithstanding no objection to the same was raised by either party. The failure to submit the bill of exceptions for examination in time is not a jurisdictional defect; hence, it may be waived, while if a proposed bill is signed and allowed by the clerk in a case where the statute does not authorize him to do so, his act of signing and settling is a nullity and the bill does not become a part of the record, even though the parties make no objection to it on that ground. So, too, the omission of the clerk's certificate authenticating a bill of exceptions cannot be waived by the parties, because the statute requires it to be thus authenticated; and to the transcript of the record of the trial court, duly certified, alone we must look for the purpose of ascertaining the proceedings had and taken in such court. (*Union P. R. Co. v. Kinney*, 47 Neb., 393, and cases there cited.) The motion to quash must be overruled.

MOTION OVERRULED.

EFFIE E. THOMPSON, ADMINISTRATRIX, v. MISSOURI PACIFIC RAILWAY COMPANY.*

ART ELIZA ALEXANDER v. JOHN OVERTON ET AL.

JAMES A. HAKE ET AL. v. SAMUEL WOOLNER.

JESSE S. MAPES ET AL. v. VILLAGE OF SYRACUSE.

HATTIE W. BROWN v. EPHRAIM P. HARTMAN.

FILED JANUARY 19, 1897. Nos. 7256, 8125, 8163, 8286, 8581.

1. **Bill of Exceptions:** OBJECTIONS TO ALLOWANCE: REVIEW. Objection to a bill of exceptions that it was not presented for examination and amendment within the statutory period, not made before the bill was signed and allowed by the trial judge, but raised for the first time in the supreme court, will not be considered.
2. ———: **WAIVER OF OBJECTIONS:** REVIEW. Where a bill is served upon the adverse party after the time therefor had expired, and the parties stipulated in writing that the trial judge should sign and allow the bill, it is a waiver of the objection that the bill was not presented within the time fixed by law or the order of the court.

MOTIONS by defendants to quash the bills of exceptions.
Motions overruled.

B. P. Waggener, James W. Orr, John C. Watson, John W. Dixon, and A. N. Sullivan, for the motions.

Matthew Gering, C. W. Seymour, Hall, McCulloch & Clarkson, E. F. Warren, M. L. Hayward, F. E. Brown, and Paul Jessen, contra.

PER CURIAM.

Each of these causes was submitted upon a motion to quash the bill of exceptions. The grounds therefor, and the facts connected therewith, are similar to those stated in *Nash v. Costello*, 50 Neb., 325, the only difference in the facts being that in none of the cases was any objection to the proposed bill made before the same was signed and

*Motion for rehearing overruled. See *post*, p. 330.

Thompson v. Missouri P. R. Co.

allowed by the trial judge, while in the case of *Hake v. Woolner*, after the statutory period for serving the bill had elapsed, the attorneys for the respective parties stipulated, in writing indorsed thereon, that the bill of exceptions should be allowed and signed by the judge. In each case the draft of the proposed bill was served upon opposing counsel out of time, and the motion to quash was not filed until months after the cause had been docketed in this court, and the briefs of plaintiff in error on the merits had been printed, served, and filed. In all the cases but two, the defendants' counsel had filed their briefs before any objection to the bill of exceptions was raised in this court. The determination of the several motions is controlled by the decision in *Nash v. Costello*, *supra*, and cases there cited. The objection now urged against the bill of exceptions has been waived, and the motions to quash are denied.

MOTIONS OVERRULED.

EFFIE E. THOMPSON, ADMINISTRATRIX, v. MISSOURI PACIFIC RAILWAY COMPANY.

FILED MARCH 3, 1897. No. 7256.

Bill of Exceptions: MOTION TO QUASH: LACHES. A motion to quash a bill of exceptions, which has been duly allowed by the trial judge and properly authenticated, made more than a year after the filing of the same and the transcript in this court, and after the service of briefs on the merits, comes too late.

MOTION by Missouri Pacific Railway Company for rehearing of preceding case, 50 Neb., 329. *Rehearing denied.*

B. P. Waggener, James W. Orr, and A. N. Sullivan, for the motion.

NORVAL, J.

Defendant asks for a rehearing of its motion to quash the bill of exceptions herein, which motion was based upon two grounds, not considered in the former opinion: (1) That no notice of the settlement of the bill of exceptions was served upon the defendant; (2) that the proposed bill was not presented to the trial judge within the time required by law. The term of court at which the judgment was rendered adjourned *sine die* on May 1, 1894, and forty days from the rising of the court was given to reduce the exceptions to writing. Subsequently the time was extended for an additional forty days. On July 17, 1894, the draft of the proposed bill of exceptions was served upon counsel for defendant, which was returned to plaintiff, with certain proposed amendments, eleven days thereafter. The bill and the amendments suggested were submitted to the trial judge for allowance without notice to the defendant. Judge Chapman makes affidavit that it was not presented to him for allowance until September 6, while Mr. Gering, in his affidavit, explicitly states that the bill and proposed amendments were delivered to the trial judge for settlement and allowance prior to August 1, 1894. The transcript and bill were filed in this court on the 20th day of October, 1894. The briefs upon the merits were filed August 15, 1895, by both parties, and the motion to quash was not filed until nearly a year and a half thereafter.

The question of veracity between Judge Chapman and Mr. Gering we shall not attempt to decide, but shall assume that the bill was presented for allowance as required by law, since the judge signed the bill without raising any objection as to time, and the defendant retained the proposed bill more than ten days after service upon it. Moreover, this objection to the bill was waived by the filing of briefs on the merits and the inexcusable delay in raising it in this court. (*Yates v. Kinney*, 23 Neb., 648.)

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The other ground of the motion to quash would have been available had it been timely presented, since it was the duty of the plaintiff to have given notice to the adverse party of the time of the presentation of the bill for settlement, as amendments to the bill were suggested. It is too late now to insist upon the lack of notice. (*Nash v. Costello*, 50 Neb., 325, and cases there cited.

MOTION OVERRULED.

HENRY E. TRUMBLE ET AL. V. WALTER TRUMBLE ET AL.

FILED JANUARY 19, 1897. No. 8943.

Bill of Exceptions: LACHES. A party seeking a bill of exceptions presented his proposed bill to the adverse party or his attorney for amendment subsequent to the expiration of the time fixed by law and the order of the trial judge, and objection to the allowance of the bill, on that ground, was distinctly made to the trial judge before the same was settled and allowed, which objection was renewed at the earliest opportunity in the appellate court, and prior to the briefing of the cause on the merits. *Held*, That the bill should be quashed. *Horbach v. City of Omaha*, 49 Neb., 851, followed.

MOTION by defendants in error to quash the bill of exceptions. *Motion sustained.*

Halleck F. Rose, for the motion.

Gilkeson, Comstock & Reese, contra.

PER CURIAM.

This cause was tried and determined in the district court of Lancaster county at the September, 1895, term thereof, and forty days from the rising of the court was granted plaintiffs in error to present the bill of exceptions to the adverse party. Subsequently the trial judge allowed forty days additional time for that purpose, but the proposed bill of exceptions was not submitted to the

defendants in error until April 20, 1896, which was more than eight days after the adjournment of the term at which the decree in question was entered. The next day the draft of the bill of exceptions was returned to plaintiffs in error, with the following indorsement thereon:

"MARTHA TRUMBLE
v.
WALTER N. TRUMBLE ET AL. } April 21, 1896.

"*To Henrietta M. Goodel and Henry E. Trumble, Mess. Gilkeson, Comstock & Reese, Their Attorneys:* We return the within draft of proposed bill of exceptions in the above entitled case, and object to its consideration or allowance as a bill by the judge who heard the case for the reason that the same was not prepared nor served upon us within the time limited by law, nor till long after the limitation provided by law for preparation and service thereof had expired, and the court and judge who heard the cause is without jurisdiction to consider, allow, and settle a bill of exceptions in said cause.

"WEBSTER, ROSE & FISHERDICK,
"*Atty's for Plaintiff, and for Defendants Walter Trumble and Charles Trumble.*"

Notwithstanding said objection, the trial judge allowed the bill, without notice, and counsel for defendants in error moved, within twelve days after the docketing of the cause in this court, to quash the bill of exceptions, upon the ground, among others, that the same was not presented to them or their clients for examination and amendment within the time limited by the statute. The question of practice presented by said motion was considered and determined in *Horbach v. City of Omaha*, 49 Neb., 851. Objection to the proposed bill on the ground that it was served out of time was made before the settlement of the bill, and it was renewed in this court at the earliest opportunity, before briefs had been prepared and served by either party on the merits, and, under the precedent above mentioned, the motion to quash the bill is sustained.

MOTION SUSTAINED.

FRANK B. GRIFFING V. SAMUEL S. CURTIS ET AL.

FILED JANUARY 19, 1897. No. 6960.

Replevin: PLEADING: SPECIAL OWNERSHIP. In replevin, where plaintiff bases his right to the possession of the property upon a special ownership therein, he must in his petition plead the facts which create such special ownership, else the pleading will be fatally defective.

ERROR from the district court of Douglas county.
Tried below before DAVIS, J. *Reversed.*

Smith & Sheean, for plaintiff in error.

Saunders & Macfarland, *contra.*

POST, C. J.

Samuel S. Curtis and Fred Sackett brought replevin in the court below against Frank B. Griffing, to recover possession of a horse, carriage, buggy, and set of harness. The trial resulted in a verdict and judgment for the plaintiffs below for the horse, and the remainder of the property was awarded the defendant, who prosecutes error to this court.

The petition in error contains seven assignments, the first of which is that the petition does not state sufficient facts to constitute a cause of action. The petition, omitting the caption, prayer, and verification, is in the following language:

"1. The plaintiffs complain of the defendant for that, the plaintiffs have a special ownership in and are entitled to the immediate possession of the following described goods and chattels, viz: One bay horse, eight years old, weighing 1,000 pounds; a certain end-spring, canopy-top, two-seated carriage; a certain end-spring open buggy, painted red, and one set of single harness, and the value of said ownership is \$106.90.

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"2. The defendant wrongfully detains said goods from the possession of the plaintiffs, and has wrongfully detained the same for one day, to plaintiffs' damage in the sum of \$5."

The plaintiffs base their right to possession alone upon a special ownership in the property, and the facts in relation thereto are not set out in the petition. The averment in the pleading of special ownership is a mere conclusion of law from particular facts which are not alleged. To constitute a good petition it should have set out the facts constituting plaintiffs' special ownership or interest in the property replevied. (*Curtis v. Cutler*, 7 Neb., 315; *Musser v. King*, 40 Neb., 892; *Randall v. Persons*, 42 Neb., 607; *Sharp v. Johnson*, 44 Neb., 165; *Camp v. Pollock*, 45 Neb., 771; *Strahle v. First Nat. Bank of Stanton*, 47 Neb., 319; *Garber v. Palmer*, 47 Neb., 704.)

Having reached the conclusion that the petition does not state a cause of action, it is not necessary to notice the other assignments of error.

REVERSED AND REMANDED.

CITY OF ORD V. ANN E. NASH.

FILED JANUARY 19, 1897. No. 6992.

1. **Municipal Corporations: SIDEWALKS.** The term "sidewalk" is a comprehensive one, and in its broadest sense denotes that portion of the public highway set apart, by dedication, ordinance, or otherwise, for the use of persons traveling on foot.
2. ———: **LIABILITY FOR FAILURE TO REPAIR STREET.** Where a city or other municipality grades or otherwise improves any portion of a street for the purpose, and with the result, of inducing public travel thereon, there is a resulting duty to keep such portion of the street in repair and a consequent liability for the failure to do so.
3. ———: **DUTY TO REPAIR STREETS: INSTRUCTIONS.** It is not error to charge that a city is required to keep its streets and sidewalks in a reasonably safe condition for travel by night as well as by day.
4. ———: ———: ———: **CONTRIBUTORY NEGLIGENCE.** An instruction

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that it is the duty of a city to keep its streets in a reasonably safe condition for travel by all persons is not objectionable on the ground that it excludes from the jury the question of alleged contributory negligence by the plaintiff.

5. **Evidence: WITNESSES: TESTIMONY AT FORMER TRIAL.** Where a witness is shown to be absent from the state, his testimony given at a former trial of the same cause is admissible if otherwise unobjectionable.
6. ———: ———: ———. Nor, in the absence of a showing upon the subject, is the fact that such witness has also testified at a second trial of the cause, which has intervened between the taking of such testimony and the one at which it is offered, a sufficient objection to its introduction in evidence.
7. ———: **EXPERIMENTS.** Some discretion is conferred upon the trial court in receiving evidence of experiments for the purpose of contradicting or corroborating other witnesses, and in order to authorize the reversal of a judgment on account of the admission or rejection of such evidence there must have been a clear abuse of discretion.

ERROR from the district court of Valley county. Tried below before HARRISON, J. *Affirmed.*

A. Norman, A. M. Robbins, and Coffin & Stone, for plaintiff in error.

Munn & Staple and Clements Bros., contra.

POST, C. J.

This was a suit by the defendant in error, Ann E. Nash, in the district court for Valley county, against the plaintiff in error, the city of Ord, the cause of action alleged being the negligence of the defendant city in causing and continuing a deep and dangerous excavation or trench at the intersection of two streets within said city, and within a few inches of the path or footway in common use by the public in passing along said streets. There was a trial below, resulting in a verdict and judgment in favor of the plaintiff therein, and which it is sought to reverse by means of this proceeding.

It is alleged in the petition below that the plaintiff therein, after dark, on the 7th day of November, 1890,

while passing along said streets, and without fault or negligence on her part, fell into the aforesaid excavation or trench, thereby receiving serious and permanent injuries, to her damage, etc., and which allegations are put in issue by the answer of the defendant city.

It is contended, first, that the trial court erred in giving instructions Nos. 2, 4, 8, and 9 on its own motion. It is not deemed necessary to set out at length the paragraphs assailed, since the particular objection now urged is that the jury were warranted in inferring therefrom that it was the duty of the city to construct and maintain a sidewalk at the place where the injury was received, and that its failure in that regard constituted actionable negligence. The instructions, it is true, state the general proposition, that a city is bound to keep its streets and sidewalks in reasonably good repair for the safe and convenient use of the traveling public, and close with the following cautionary statement: "The city of Ord is not an insurer of the condition of its streets and sidewalks; nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient to relieve it from liability if the streets and sidewalks were in a reasonably safe condition for foot travel by night. If in this case it is shown by the evidence that at the place where the plaintiff claims she met with her injury the street or sidewalk was in a reasonably safe condition for foot travelers, your verdict should be for the defendant." The term "sidewalks," although, perhaps, not the most precise or accurate which, under the circumstances of the case, might have been employed, could not, we think, have misled the jury or diverted their minds from the real issue presented by the pleadings and proofs. The alleged negligence, as we have seen, was the causing and continuing of a dangerous trench in the public street within a few inches of the path or footway in common use by the public. We are aware of no rule requiring the construction of artificial sidewalks as a condition precedent to the right of foot passengers to the safe and

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convenient use of streets actually opened and dedicated to public uses. The term "sidewalk" is a comprehensive one, and in its broadest sense denotes that portion of the public highway which is set apart by dedication, ordinance, or otherwise for the use of pedestrians. (See Elliott, *Streets & Roads*, p. 17.) In *James v. City of Portage*, 48 Wis., 677, a case strongly in point, it is said: "If a street in a city is adopted or laid out and opened as a highway for all kinds of travel thereon, and, without any direction or interference of the city or its authorities, a portion thereof alongside of the part used for teams and carriages is used by the people who travel on foot as a footway or sidewalk, that part so used becomes as much a part of such street as that used for the passage of teams and carriages." And, in general, where a city or other municipality grades or improves any portion of a street for the purpose, and with the result of inducing public travel thereon, there is a resulting duty to keep such portion in repair and the consequent liability for a failure to do so. (*Lindholm v. City of St. Paul*, 19 Minn., 245; *Triese v. City of St. Paul*, 36 Minn., 526; *City of Lincoln v. Gillilan*, 18 Neb., 114; *City of South Omaha v. Cunningham*, 31 Neb., 316.) The streets in question had been graded and improved by authority of the city, and the trench described in the petition was made some time previous to the accident, in order to facilitate the repairing of water mains laid the year previous. The plaintiff below was, at the time of the accident, returning to her home from the house of a neighbor along a path extending east and west, commonly used by pedestrians, and which, at the intersection of said streets, was within a few inches of the trench above described. The instructions complained of could not, therefore, have misled the jury to the prejudice of the defendant city, which had, by inducing public travel at the point in question, assumed the burden of keeping the streets in repair.

An additional objection to instruction No. 4 is on account of the statement therein that a city is required to

keep its streets and sidewalks in a reasonably safe condition for travel "by night as well as by day." It is argued that the duty thus imposed would require the lighting by the city of all streets within its limits. But the objection is, we think, without force. The rule stated is elementary and has been recognized as sound by all writers who have had occasion to comment upon the subject. (See Dillon, *Municipal Corporations*, sec. 1019; Elliott, *Roads & Streets*, p. 448; *Tritz v. City of Kansas City*, 84 Mo., 632.)

Exception is taken to instruction No. 8 given at the request of the plaintiff below, to the effect that it is the duty of a city to keep its streets in a reasonably safe condition for travel by all persons. The particular criticism of this instruction is directed to the word "all," which, it is contended, excludes from the jury the question of contributory negligence; but in the same sentence it is expressly stated that the plaintiff, in order to recover, must prove that the injury complained of was received without fault on her part, and in other paragraphs the law of contributory negligence is correctly stated and applied. The use of the word "all," if erroneous, is accordingly error without prejudice.

Another assignment is the admission in evidence, over the objection of the defendant city, of the testimony of Mrs. Way given on a former trial. It appears from the admissions of counsel that there were two trials of the cause previous to that resulting in the judgment now before us for review, at each of which Mrs. Way testified in behalf of the plaintiff therein. It is also shown and not disputed, that the witness named is now a resident of the state of California and was not within the jurisdiction of the district court at the date of the third trial. From the testimony of Mr. Henderson, the stenographer who reported the proceedings of the second trial, it appears that the notes taken by him have been destroyed and the testimony then given cannot be reproduced. Upon that showing the plaintiff was permitted to read in evidence the testimony of said witness on the first trial. It has

been held in this state that where a witness is shown to be absent from the state, his testimony given at a former trial of the same cause is admissible in evidence if otherwise unobjectionable. (*City of Omaha v. Jansen*, 35 Neb., 68; *Omaha Street R. Co. v. Elkins*, 39 Neb., 480.) It is contended that the rule there recognized is not applicable to the facts of this case, since it would, in the language of counsel, "be manifestly unfair to allow the plaintiff to select the testimony first given by the witness for the reason that the same was more favorable to her side of the case." There is, however, no ground for that contention. In the first place, it cannot be inferred that the testimony of the witness at the first trial was more favorable to the plaintiff below than that subsequently given by her; and, secondly, the reason for the admission of such evidence is applicable to each of several trials at which testimony was given by the witness touching the issue involved. (1 Greenleaf, Evidence, sec. 163.) It is unnecessary to examine the cases cited by the city. It is sufficient that they in nowise conflict with the views here expressed.

Finally, it is argued that the trial court erred in rejecting as evidence the result of certain experiments made a year or more subsequent to the accident. The witnesses named were, according to the offer in the record, on a cloudy night, with the assistance of a light in an adjoining house, similarly situated to one burning at the time of the accident, able to plainly see the footpath and also the surface of the ground, for a radius of several feet from the point where the injury was received. There is, as all agree, some room for the exercise of discretion by the trial court in the receiving and rejecting of evidence of this character, and we are unable to say that there has, in this instance, been an abuse of such discretion. We must not be understood as intimating that it would have been reversible error to receive the evidence offered; but the rejecting of evidence tending to prove that the condition of the premises was, at a sub-

sequent time, discernible by witnesses whose attention was specially directed to the subject, and under circumstances in some respect at least materially different from those surrounding the plaintiff below at the time of the accident, affords no ground of complaint by the city.

There is no prejudicial error disclosed by the record, and the judgment is

AFFIRMED.

HARRISON, J., not sitting.

CREIGHTON UNIVERSITY, APPELLEE, v. JAMES E. RILEY
ET AL., APPELLANTS.

FILED JANUARY 19, 1897. No. 6950.

1. **Review: JUDICIAL SALES: OBJECTIONS.** Grounds for setting aside a judicial sale are unavailing on review unless they were presented in the court below.
2. ———: ———: **CONFLICTING EVIDENCE.** The rule that this court will not disturb the finding of a trial court made upon conflicting testimony applies to orders confirming judicial sales.

APPEAL from the district court of Douglas county.
Heard below before WALTON, J. *Affirmed.*

E. C. Page, for appellants.

Frank T. Ransom, contra.

POST, C. J.

This is an appeal from an order confirming a sale of real estate. The grounds relied upon for a reversal are: (1.) The officer conducting the sale made no announcement of the property about to be sold. (2.) The sale was not opened at the advertised time.

The first objection not having been raised in the court below in the motion to set aside the sale, is not available

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on review in this court. (*Ecklund v. Willis*, 44 Neb., 129; *Hooper v. Castetter*, 45 Neb., 67.) Moreover, there is ample testimony in the record tending to prove that the officer did announce the property to be sold prior to the sale. The sale was advertised to take place on October 31, 1893, at 10 o'clock A. M. Whether the sale was actually opened at the precise hour named, the testimony is conflicting. The sheriff's return to the order of sale discloses that the property was offered at the time stated, and the testimony in support of the return is sufficient to show that the sale was opened at 10 o'clock in the morning of said day, and remained open for one hour thereafter. The testimony adduced by the defendant is to the effect that the property was not offered for sale before 11:10 A. M. Even if this were true it was not shown that there was any person present at the place of sale between 10 o'clock and that hour who desired to make a bid upon the property, or that the defendants were in any manner prejudiced by the omission of the officer to proceed with the sale at the appointed hour, if he did so fail. There is sufficient evidence in the record to sustain the finding of the court below that the sale was held at the appointed time, and the order of confirmation is accordingly

AFFIRMED.

OMAHA LOAN & TRUST COMPANY SAVINGS BANK, APPELLEE, v. BENJAMIN P. KNIGHT ET AL., APPELLANTS.

FILED JANUARY 19, 1897. No. 7001.

1. **Review:** LACHES. A judgment or decree from which no appeal has been taken within the statutory time will not be reviewed by the appellate court.
2. **Appearance:** WAIVER OF DEFECTS. A general appearance by a defendant in a cause is a waiver of all defects in the issuance and service of the summons, and gives the court jurisdiction.

APPEAL from the district court of Douglas county.
Heard below before FERGUSON, J. *Affirmed.*

John L. Carr, for appellants.

Francis A. Brogan, *contra.*

POST, C. J.

On the 5th day of November, 1892, a decree of foreclosure of a real estate mortgage was entered in the cause in the court below, it finding that there was due the plaintiff from Benjamin P. Knight and Adeline F. Knight the sum of \$2,671.86, and directing that the mortgaged premises be sold to satisfy the same unless said sum should be paid within twenty days from that date, and "that if there be any balance remaining due the plaintiff after said sale, a judgment shall be rendered in favor of the plaintiff, and against the defendants Benjamin P. Knight and Adeline F. Knight, for the amount thereof." Subsequently an order of sale was issued, and the property sold thereunder, which sale was duly confirmed by the court. Thereafter, on April 4, 1893, plaintiff filed a motion for a deficiency judgment, and notice of the time and place of the hearing thereof was served upon the defendants by delivering to Benjamin P. Knight personally a true and certified copy of the notice and motion, and by leaving a like copy of each for Adeline F. Knight at her usual place of residence in Douglas county. Pending the hearing of this motion Mrs. Knight filed a petition to modify the said decree of foreclosure so far as it found that she was liable for a judgment for any deficiency there should be after the sale of the property. A deficiency judgment was rendered against Benjamin P. Knight on April 27, 1893, and the motion for a deficiency judgment against Mrs. Knight was continued to await the hearing of her application to modify the decree. At the September, 1893, term of the court, to-wit, on November 23, 1893, the petition to modify the decree was denied,

and a deficiency judgment was rendered against Adeline F. Knight for \$920.08. Afterwards, and at the February, 1894, term, a motion was filed by her to set aside the deficiency judgment rendered at the preceding term, which motion was denied on March 27, 1894. The transcript on appeal was filed in this court on the 6th day of June, 1894.

Most of the questions argued in the brief of appellants are based upon alleged errors in the cause preceding the entry of either the original decree or the deficiency judgments, which were rendered against Mrs. Knight, and cannot now be reviewed, inasmuch as the decree of foreclosure was rendered more than two years, and the last deficiency judgment was entered more than six months, prior to the docketing of the appeal in this court. No appeal having been taken from such judgments or decree within the statutory limit, there is no jurisdiction to review either of them. (*Renard v. Thomas*, 50 Neb., 398, and cases there cited.) Neither of the appellants is in a situation to take advantage of the errors of the court in entering the decree or deficiency judgment, if errors were committed.

The sole matter before the court for determination is the correctness of the decision denying the motion to set aside the deficiency judgment rendered against Mrs. Knight, as that was the only order from which an appeal has been prosecuted in time. The ground of the motion is that the deficiency judgment was irregularly obtained, in that the summons served on Mrs. Knight did not apprise her that plaintiff claimed a deficiency judgment. The summons contained this indorsement: "Amount claimed of defendant by the plaintiff is \$—, and foreclosure of mortgage." Whether this was sufficient to authorize the entry of a personal judgment in the case against Mrs. Knight is wholly immaterial, for two reasons: First, notice of the application for the deficiency judgment was duly served upon her. In the next place, she appeared and resisted the application, and subsequently moved to set aside the

judgment for deficiency. This constituted a waiver of the defects, if any there were, in the indorsement on the summons. (*Cropsey v. Wiggenghorn*, 3 Neb., 108; *Orr v. Seaton*, 1 Neb., 105; *Crowell v. Calloway*, 3 Neb., 215; *White v. Merriam*, 16 Neb., 96; *Warren v. Dick*, 17 Neb., 241; *Tootle v. Jones*, 19 Neb., 588.) No error was committed in refusing to vacate the deficiency judgment, and the order is accordingly

AFFIRMED.

MODERN WOODMEN ACCIDENT ASSOCIATION V. ALBERT
M. KLINE.

FILED JANUARY 19, 1897. No. 6890.

1. **Insurance: AMBIGUITY IN POLICY: PAROL EVIDENCE.** Where, by reason of omission or ambiguity, in a written policy of insurance the time when such instrument becomes operative is left in doubt, parol evidence is admissible for the purpose of supplying such omissions.
2. ———: **CONTRACT: PAYMENT OF ASSESSMENTS.** The parties to a contract of insurance may stipulate that such contract will not become operative as an indemnity until payment in full by the insured of all charges and assessments required by the constitution, rules, and regulations of the insurer.
3. ———: ———: **WAIVER.** *Held*, From an examination of the evidence, that the receipt of payment by the defendant association, subsequent to the injury claimed for, applied to future indemnity only, and was not a waiver of payment in full as condition to the taking effect of the certificate or policy of insurance.

ERROR from the district court of Lancaster county.
Tried below before STRODE, J. *Reversed*.

The opinion contains a statement of the case.

A. R. Talbot, for plaintiff in error:

The court erred in not receiving and giving weight to the parol testimony of the defendant showing the truth

and conditions upon which the certificate was issued and the agreement as to when it should be in force. (*Morse v. Rice*, 36 Neb., 212; *Luce v. Foster*, 42 Neb., 818; *Barnett v. Pratt*, 37 Neb., 349; *Lyon v. Supreme Assembly*, 26 N. E. Rep. [Mass.], 236; *McAlpin v. Cassidy*, 17 Tex., 462; *Sheldon v. Atlantic Ins. Co.*, 26 N. Y., 460; *Bradley v. Potomac Ins. Co.*, 32 Md., 108; *Pitt v. Berkshire Life Ins. Co.*, 100 Mass., 504; *Bergson v. Builders' Ins. Co.*, 38 Cal., 545; *Burke v. Dulancy*, 153 U. S., 228; *Ware v. Allen*, 128 U. S., 591; *Pym v. Campbell*, 6 El. & Bl. [Eng.], 370; *Davies v. Jones*, 17 C. B. [Eng.], 625; *Wallis v. Littell*, 11 C. B., n. s. [Eng.], 369; *Wilson v. Powers*, 130 Mass., 127; *Pawling v. United States*, 4 Cranch [U. S.], 219; *Perrine v. Cheeseman*, 19 Am. Dec. [N. J.], 388; *Reynolds v. Robinson*, 110 N. Y., 654; *Simonton v. Steele*, 1 Ala., 357; *Roberts v. Austin*, 5 Whart. [Pa.], 313; *Benton v. Martin*, 52 N. Y., 570; *Sweet v. Stevens*, 7 R. I., 375; *Stevens v. Parker*, 7 Allen [Mass.], 361; *Curry v. Cotton State Life Ins. Co.*, 51 Ga., 624; *Todd v. Piedmont Life Ins. Co.*, 34 La. Ann., 63; *Baile v. St. Joseph Fire & Marine Ins. Co.*, 73 Mo., 371; *Garlich v. Mississippi Ins. Co.*, 44 Ia., 553; *How v. Union Mutual Life Ins. Co.*, 80 N. Y., 32; *Ormond v. Fidelity Life Ass'n*, 96 N. Car., 158; *Worthington v. Charter Oak Life Ins. Co.*, 41 Conn., 401.)

Plaintiff in error did not waive its right to insist upon the certificate not being in force at the time of the accident by accepting Kline as a member of the association after the injury. (*Lyon v. Supreme Assembly*, 26 N. E. Rep. [Mass.], 236; *McCoy v. Roman Catholic Mutual Ins. Co.*, 152 Mass., 272; *Hale v. Mechanics Mutual Ins. Co.*, 6 Gray [Mass.], 169; *Sweet v. Citizens Mutual Relief Society*, 78 Me., 541; *Miller v. Hillsborough Fire Ins. Ass'n*, 7 Atl. Rep. [N. J.], 895; *Fairfield Savings Bank v. Chase*, 72 Me., 226.)

Walter J. Lamb and H. W. Quaintance, contra:

An acknowledgment of the receipt of the money, which is the consideration for the making of the policy, cannot be contradicted in a suit brought upon that policy. (*Con-*

solidated Real Estate & Fire Ins. Co. v. Cashow, 41 Md., 59; *Basch v. Humboldt Mutual Fire & Marine Ins. Co.*, 35 N. J. Law, 429; *Baum v. Parkhurst*, 26 Ill. App., 128; *Illinois Central Ins. Co. v. Wolf*, 37 Ill., 355; *Teutonia Life Ins. Co. v. Anderson*, 77 Ill., 386; *Provident Life Ins. Co. v. Fennell*, 49 Ill., 180.)

Testimony of a prior parol agreement that the policy should not be in force until paid for is inadmissible. (*Baum v. Parkhurst*, 26 Ill. App., 130; *Thomas v. Scutt*, 127 N. Y., 138; *Wurtzbarger v. Anniston Rolling Mills*, 10 So. Rep. [Ala.], 129; *Haworth v. Norris*, 10 So. Rep. [Fla.], 18; *Casselberry v. Warren*, 40 Ill. App., 626; *Dodge v. Kiene*, 28 Neb., 221; *Bushaw v. Women's Mutual Ins. & Accident Co.*, 8 N. Y. S., 423.)

The insurer waived the forfeiture, if any, and became liable for the injury sustained by Kline from the date of the policy, by receiving the consideration money therefor. (*Schoneman v. Western Horse & Cattle Ins. Co.*, 16 Neb., 404; *Bevin v. Connecticut Mutual Life Ins. Co.*, 23 Conn., 244; *Hodson v. Guardian Life Ins. Co.*, 97 Mass., 144; *Ellis v. State Ins. Co.*, 27 N. W. Rep. [Ia.], 762; *Phoenix Ins. Co. v. Tomlinson*, 25 N. E. Rep. [Ind.], 126; *Phoenix Ins. Co. v. Lansing*, 15 Neb., 494; *Nebraska & Iowa Ins. Co. v. Christensen*, 29 Neb., 572; *Palmer v. Phenix Mutual Life Ins. Co.*, 84 N. Y., 63; *McAllister v. New England Mutual Ins. Co.*, 101 Mass., 558.)

It was not necessary that the insurer, by its secretary, should expressly waive the prepayment of the membership fee. It is sufficient as an estoppel that the company led plaintiff below to believe that it would do so. (*Odd Fellows' Mutual Aid Association v. Sweetser*, 19 N. E. Rep. [Ind.], 722; *Michigan Mutual Life Ins. Co. v. Custer*, 27 N. E. Rep. [Ind.], 124.)

POST, C. J.

The defendant in error, Albert M. Kline, recovered judgment in the district court for Lancaster county upon a contract of indemnity issued by the defendant in error,

the Modern Woodmen Accident Association, a Nebraska corporation, hereafter called the "association." The certificate of membership, which is made a part of the petition below, recites that "in consideration of the warranties in the application for this certificate, and the agreement on the part of the certificate holder to accept the conditions contained in his application and this certificate, as the basis of this contract, and in consideration of three dollars (\$3) paid by Albert M. Kline, of Lincoln, Lancaster county, Nebraska, the receipt whereof is hereby acknowledged, does hereby constitute the said applicant a certificate holder of said association, and agrees to pay the said certificate holder upon the following conditions, the following sums of money. Provided, however, * * * First, that the certificate holder shall be bound by the rules and regulations of this association; Second, that the certificate holder shall pay all assessments levied or assessed upon him by this association, and this certificate shall not take effect until all assessments as aforesaid, and payable prior to the accident for which indemnity or benefit is claimed, are received by the association previous to such accident, and a failure to pay such assessments on or before such assessments are due and payable, shall render this certificate void, and all moneys paid by the holder thereof on account of this certificate shall be forfeited to this association."

Section 4, article 8, of the constitution of the association, provides that "assessments for the payment of benefits will be made in sums of \$2 and \$3 each, and as far as possible at the beginning of the quarter, and shall be used for no other purpose except as herein specified." It is by section 6 of the same article further provided that "any one desiring indemnity from the date of his application must forward to the secretary therewith an amount equal to 15 or 25 cents per week until the next quarterly assessment." Mr. Kline, according to his own testimony, visited the office of the association on the 16th day of November, 1891, where, after some conversation

relating to the subject of insurance, he remarked to Mr. Hicks, the secretary, that he would like a certificate, or "policy" as it is called by him, but would not be prepared to pay the charges therefor before the 28th day of the same month, and that in reply thereto Mr. Hicks said, "All right; that don't make any difference. * * * You can hand it to me the first of the month." * * * I asked how much it would be. He said: 'The fee is \$3. We charge \$2 a quarter at the rate of 15 cents a week.' I said, 'How much will that be?' He said, '90 cents on the first day of January.' An application was at said time signed by the insured, presumably in the usual form, except that the words "Insurance in force from date of certificate" appeared to have been erased, and the certificate issued thereon, bearing date of November 17, was received by the insured on the 18th. On the following day, to-wit, November 19, the insured received the injury for which he claims in this action, and on November 30 he paid to Mr. Hicks for the certificate so issued the sum of \$3.75, taking the latter's receipt therefor as secretary of the association. He further testified, referring to the transaction on the day last mentioned, as follows:

"I went round as I said to pay him \$3.90. I handed him \$5. He took out \$3.75 and gave me a receipt. * * * I said, 'I thought it was \$3.90.' He said, '\$3.75.' I told him what I heard him say, and he said, 'I know.' * * * He said, 'that does not cover your late accident.'"

Q. Did he (Hicks) tell you when the policy took effect?

A. Yes, sir.

Q. When did he tell you that?

A. He told me that day when I paid him.

Q. When did he tell you it took effect?

A. The 30th day of the month, when it took effect.

Q. He did not tell you when you made the application?

A. No. He said, "Come on the first day of the month and I will give you the policy."

It is argued in support of the judgment that the recital of the certificate, acknowledging receipt of the premium

or membership fee, cannot be controverted in an action on such certificate, and that the defendant association is thereby estopped from averring nonpayment as a defense thereto. But the evidence, even of the insured himself, instead of contradicting the certificate, merely tends to establish that which is left in doubt by the recitals thereof, viz., the date when such certificate became effective as a contract of indemnity. There is, it will be observed, a marked difference between the terms of the agreement here involved and those contracts of insurance which are in terms or by implication made effective for a definite period, or from a specified date. The certificate, as we have seen, provides that it shall not take effect until after payment in full by the insured of all assessments levied against him, while by the terms of the constitution, and also according to the understanding of the insured, he was chargeable with the assessment for the unexpired portion of the current quarter. The regulation in that regard transgresses no rule of law or morals, since the burden thereby imposed upon new members is in exact proportion to that borne by those holding certificates in the association at the beginning of the quarter. We are, by counsel for the defendant in error, referred to decisions of this court declaring that stipulations for the forfeiture of policies of insurance on account of the nonpayment of premium notes is for the benefit of the insurer and will be waived by an acceptance of the premium subsequent to the default. Such is the holding in *Phoenix Ins. Co. v. Lansing*, 15 Neb., 494, *Schoneman v. Western Horse & Cattle Ins. Co.*, 16 Neb., 404, *Nebraska & Iowa Ins. Co. v. Christensen*, 29 Neb., 572, and *Phoenix Ins. Co. v. Bachelder*, 32 Neb., 490. But in the cases above mentioned, and we believe in each of those cited by counsel, the insurance was for a definite period, and the waiver operated merely to prevent a forfeiture of a policy which had by its terms become operative as a contract. In this case, however, there was, so far as the record discloses, no agreement, written or otherwise, to the effect that the

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certificate should become operative previous to the payment in full of the membership fee and assessment prescribed by the constitution. The sum paid by defendant in error to Mr. Hicks on November 30, 1891, was the precise amount essential to constitute the former a member of the association from and after that date, and was received with the statement that the indemnity provided for did not include the injury previously received by the insured. The reasons which controlled the cases cited are here entirely wanting, since, as we have seen, the real question at issue is the time when the certificate took effect as a contract of insurance, and there is certainly nothing inequitable in the proposition, abundantly sustained by the record, that the payment of \$3.75 was made and accepted in consideration of future indemnity. It follows that there was no waiver of the terms and conditions of the contract with respect to payment by the insured. The judgment is accordingly reversed and the cause remanded for further proceedings in the district court.

REVERSED.

JOHN FANTON V. STATE OF NEBRASKA.

FILED JANUARY 19, 1897. No. 8498.

1. **Criminal Law: CONTINUANCE: ADMISSION AS TO TESTIMONY OF ABSENT WITNESS.** On a motion for continuance being presented in a criminal case, if it appears that the witness or witnesses to obtain the testimony of whom the continuance is sought is or are without the jurisdiction of the court, and not within reach of its process, and the attorney for the adverse party will admit that the witness or witnesses, if present or their depositions taken, would testify as stated in the affidavit accompanying the motion for continuance, and agree that such statement shall be introduced during the trial, as might be the testimony if taken and offered in regular form, the motion may be overruled. Whether it shall be overruled or not is a matter resting within the discretion of the trial court, and if no abuse of such discretion is disclosed by the

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record the action on the motion will not be disturbed in error proceedings in this court.

2. **Larceny: VERDICT, AGAINST ACCUSED.** The evidence *held* sufficient to sustain the verdict.
3. **Jurors.** All other questions raised and discussed in the error proceedings to this court fall directly within and are governed by the rules announced in the opinion in the case of *Barney v. State*, 49 Neb., 515, and need not be again discussed at this time.

ERROR to the district court for Holt county. Tried below before WESTOVER, J. *Affirmed.*

R. R. Dickson, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day*, Deputy Attorney General, for the state.

HARRISON, J.

An information was filed in the district court of Holt county, in which plaintiff in error was charged with the larceny of eighteen head of cattle in said county, the property of one Timothy Cross and of the value of \$300. To this information, on being arraigned, the plaintiff in error pleaded not guilty, and as the result of a trial was convicted and sentenced to imprisonment in the penitentiary for a term of eight years. He presents the case to this court for review, alleging in his petition many errors, a number of which are in relation to the action of the trial court in the discharge of a regular panel of jurors and matters incidental thereto, the ordering and summoning special panels of jurors, and overruling certain objections to the same. It was also assigned that the court erred in instructing the jury as follows: "A doubt, to justify an acquittal, must be a reasonable one, and must arise from a candid and impartial investigation of all the evidence in the case. A doubt produced by an undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt, and the juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and

remote conjectures as to possible states of facts differing from those established by the evidence. You are not at liberty to disbelieve, as jurors, if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. If, after a careful and impartial examination and consideration of all the evidence in the case, you can say that you feel an abiding conviction of the guilt of the defendant, and are fully satisfied, to a moral certainty, of the truth of the charge made against him, then the jury are satisfied beyond a reasonable doubt." It was further claimed that the sentence was excessive. In the case of *Barney v. State*, 49 Neb., 515, the plaintiff in error was informed against in the district court of Holt county and tried on the charge of stealing cattle. The trial was at the same term of court during which the case at bar was tried. That case was reviewed in this court and an opinion filed October 22, 1896. The questions therein presented and decided were identical with the ones involved in this case, which we have heretofore generally or specifically designated, and some of them, in regard to jurors, had their origin in the same conditions, facts, and circumstances, and they fall within and are governed by the rules then announced, which we now approve, as follows:

"1. A district judge may, for any lawful cause, discharge a regular panel of the petit jury, and direct the sheriff to call other jurors to take its place.

"2. The fact that the jury was illegally drawn is a sufficient cause for discharging it from service.

"3. The fact that all, or nearly all, jurors upon the regular panel are disqualified from sitting in any case remaining to be tried at the term is a sufficient cause for discharging the panel.

"4. The provisions of section 465a of the Criminal Code are not exclusive, but are to be construed in connection with section 664 of the Civil Code.

"5. Therefore, when the causes exist which authorize

the court to order a special venire under section 465a of the Criminal Code, the court may, instead of so doing, in its discretion,—the regular panel being disqualified from sitting in other cases during the term,—discharge that panel and direct a new jury to be drawn under the provisions of section 664, Code of Civil Procedure.

“6. A rule of court is an order made by a court having competent jurisdiction, and therefore under section 8, chapter 5, Compiled Statutes, in a district where there are two district judges, the court may, by special order, direct a jury of less than forty-eight to be drawn; such special order being a ‘rule’ within the meaning of that section.

“9. In a criminal case it is not erroneous to direct the jury that its oath imposes upon it no obligation to doubt where no doubt would have existed if no oath had been administered. *Spies v. People*, 12 N. E. Rep., 865, 17 N. E. Rep., 898, and 122 Ill., 1, followed.

“10. Where no error appears in the record of a criminal case, and the sentence imposed is one warranted by the statute, it will not be reduced by this court because of apparent undue severity. To so reduce it would, in such case, be an act of clemency, and not a judicial review of the trial; and the exercise of such clemency is a power reposed by the constitution in the governor, and not in this court.”

It appears that the plaintiff in error was arrested January 28, 1896, was given a preliminary hearing before the county judge of Holt county on February 15, 1896, and was held to appear before the district court, which was then in session, having convened on the 8th day of February, 1896. On the 17th of the same month the information was filed in the trial court. On the 18th the plaintiff in error was arraigned and entered a plea of not guilty. According to an affidavit accompanying the motion on behalf of plaintiff in error for a continuance, the case was, on the 19th of February, set for trial on the 25th. On the latter day the first motion for a continu-

ance was filed, and on the following day a further showing having the same purpose was filed. This motion was presented to the judge then presiding (there being two in the district), and nothing more was done until the case was called for trial, on April 8, by the other judge, who was then on the bench in Holt county, when objections to his hearing the motion were made and overruled. On the succeeding day, April 9, the plaintiff in error was allowed to refile the motion for continuance and all accompanying papers which had been filed February 25 and 26, and also filed an additional showing. The motion was denied and on April 10 the plaintiff in error was placed on trial. The jury failed to agree and was discharged. This last was done April 14, and the case was then set for trial on the 4th day of the following month of May. On the 6th day of May the plaintiff in error, by leave of court, refiled the motion for continuance, with all the affidavits which had been prepared and presented in that connection, and some additional ones. The motion was heard and after an admission by the county attorney, for the state, that the witnesses named in the affidavits filed in support of the motion for a continuance would, if present, testify to the state of facts set forth, and the further agreement that they might be read as evidence in the case, was overruled and the plaintiff in error was again placed on trial, and this time was convicted. The order overruling the motion for continuance is now the subject of complaint. The affidavits, or such portions of them as contained statements of what might be expected to be proven by absent witnesses, if present, were, during the trial, admitted in evidence. There is no statutory provision in this state governing the subject of continuances of trials of causes, either civil or criminal, pending in a district court. Such applications are, however, entertained, whether they shall be granted or refused resting largely within the discretion of the trial court. A refusal of such an application cannot be error calling for a reversal of the case, unless there appears to

have been an abuse of such discretion. (*Burrell v. State*, 25 Neb., 581.)

The rule that in a civil action an admission that the proposed witness would, if in court, testify as stated in an affidavit filed with a motion for a continuance of the cause, coupled with an agreement that the affidavits be read during the trial as evidence of the absent witness, may be sufficient to do away with the necessity for or right to a continuance and relieve the denial of one, if any error, was announced in *Burris v. Court*, 48 Neb., 179, but has not been settled in a direct criminal proceeding. The witnesses whose evidence was desired in the case at bar were, at the time of the motion for a continuance on the ground of their absence, without the jurisdiction of the court, and were not within the reach of its process; hence there was no denial, in the refusal to grant a continuance, of the constitutional right of one charged with a felony "to have process to compel the attendance of witnesses in his behalf" (Constitution, sec. 11, art. 1), or the statutory one given by section 461 of the Criminal Code, wherein it states that "any person accused of crime amounting to a felony shall have compulsory process to enforce the attendance of witnesses in his behalf;" for such process would have been futile and its issuance void of results. It was a withholding, at most, of the opportunity of obtaining the attendance of witnesses without the process of the court, or to take their depositions, this last being accorded to parties charged with crime by section 462 of the Criminal Code. "A continuance, according to the general practice, may be refused if the adverse party will admit that such witness would testify as is supposed by the party moving for a continuance." (Wharton, Criminal Pleading & Practice [9th ed.], sec. 595, and cases cited in note 3.) The above is the rule at common law where the witness is beyond the jurisdiction of the court. (4 Ency. Pleading & Practice, 865-6, and cases cited in note 2 to last page; also, page 868 and note 1.) In some states the rule

we have quoted, either entire or modified in some particular, has been embodied in statutory enactments, which have been made the objects of attack on the ground of their depriving the accused of the right of compulsory process for his witnesses, and of equal protection under the law. For a case in which such an attack was successful, see *State v. Berkley*, 4 S. W. Rep. [Mo.], 24, but in the same state it has been said: "The right to compulsory process for witnesses does not and cannot extend to non-resident witnesses." (*State v. Pagels*, 4 S. W. Rep. [Mo.], 931; *State v. Butler*, 67 Mo., 59.) Such an enactment has been approved in Kansas. It was first a rule of the supreme court, then enacted by the legislature. (See *State v. Bartley*, 48 Kan., 421; *Thompson v. State*, 5 Kan., 159; *State v. Rhea*, 25 Kan., 576.) Also in Kentucky (*Pace v. Commonwealth*, 89 Ky., 207; *Atkins v. Commonwealth*, 30 S. W. Rep. [Ky.], 948); in Illinois (*Keating v. People*, 43 N. E. Rep., 724, 160 Ill., 480); in Iowa (*State v. Felter*, 25 Ia., 73). (See, also, *Territory v. Perkins*, 2 Mont., 470; *McNealley v. State*, 36 Pac. Rep. [Wyo.], 824; *Territory v. Guthrie*, 2 Ida., 398.) There are arguments on this question, both *pro* and *con*, which are forcible, but it would serve no useful purpose either to summarize or set them forth at length. In this state, after the agreement and admission is made, as they were in the case at bar, the allowance or refusal of the continuance is still a matter within the sound discretion of the trial judge, as he is conversant with all the facts and circumstances of the case, and not only such as are disclosed by the affidavits filed with the application, but the conditions existing at the time, and what he may determine is the right and proper disposition of the request must be approved, unless an abuse of the discretion vested in him is apparent from an examination of the record. Such is not the case here. A careful perusal of the record, in so far as it appertains to the continuance, discloses no abuse of the discretion of the trial court in overruling the motion therefor; hence, this assignment is unavailing.

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A further assignment is that the verdict was contrary to the evidence and not supported thereby. The main evidence against the accused was given by two of the witnesses, who, by their own confession, were cattle thieves and the accomplices of the plaintiff in error in the crime with which he was charged, and for the alleged commission of which he was on trial, but there were corroborative facts and circumstances. The credibility of these witnesses and the weight to be accorded their testimony were matters for the jury to determine. After a careful examination of the evidence, we do not feel warranted in the conclusion that there was not sufficient thereof to sustain the verdict; hence it will not be disturbed. The judgment of the district court is

AFFIRMED.

CHRIST ENGLE, APPELLEE, V. GEORGE HUNT, APPELLANT.

FILED JANUARY 19, 1897. No. 6966.

1. **Highways: PRESCRIPTION: EVIDENCE.** The existence of a legal public road over the premises of a private person may be shown by user alone, but in such case the user must have been with the knowledge of the owner and have continued the length of time necessary to bar an action to recover the title to land. This rule, however, does not apply when the user is of wild, unenclosed prairie land. *Graham v. Hartnett*, 10 Neb., 517, approved and followed.
2. ———: ———. To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land.
3. ———: **EASEMENTS.** To acquire an easement or way on another's land there must be a use of the way for the length of time which will bar an action for the recovery of title to land, and which is under claim of right, or adverse.
4. ———. The evidence held sufficient to sustain the findings and judgment.

APPEAL from the district court of Seward county.
Heard below before WHEELER, J. *Affirmed.*

Norval Brothers and George W. Lowley, for appellant.

References: 2 Am. & Eng. Ency. Law, 651, 712; *Taft v. Commonwealth*, 33 N. E. Rep. [Mass.], 1046; *Wayne County Savings Bank v. Stockwell*, 84 Mich., 586; *Reimer v. Stuber*, 59 Am. Dec. [Pa.], 744; *French v. Marstin*, 57 Am. Dec. [N. H.], 294; *Worrall v. Rhoades*, 30 Am. Dec. [Pa.], 274; *Nelson v. Jenkins*, 42 Neb., 133; *Weld v. Brooks*, 25 N. E. Rep. [Mass.], 719; *Colburn v. Marsh*, 68 Hun [N. Y.], 269; *Garrett v. Jackson*, 20 Pa. St., 331; *Pierce v. Cloud*, 82 Am. Dec. [Pa.], 496; *Hamilton v. White*, 5 N. Y., 9; *Sims v. Davis*, 34 Am. Dec. [S. Car.], 583.

Biggs & Thomas and Thomas A. Healey, contra.

HARRISON, J.

The appellee filed a petition in the district court of Seward county, in which it was alleged that he was the owner of, and in possession, and had been since a day not definitely stated, of certain described portions of section 26, in township 10 north, of range 3 east of the 6th P. M. in Seward county, and that said premises were, and had been during several years preceding the commencement of this suit, enclosed by a fence; that on or about the 3d day of April, 1893, and at other times subsequent thereto, the appellant wrongfully and unlawfully destroyed, broke, and removed the gates of appellee on said premises and used a portion of the land of appellee as a road or highway. A threatened continuation of the alleged trespasses was pleaded, and the petition concluded with a prayer that the appellant be enjoined from committing any and all of the threatened acts. To the petition the appellant filed an answer, in which it was admitted that he had done the things with the doing of which he stood charged in the petition, but pleaded that

he was the owner of certain portions of the same section of land described in appellee's petition; that there was a public highway on and along the half section line running east and west through said section, which had become such public highway or road by the length of time which it had been in use as a road by the public or had been established as a highway by prescription. It was further set forth that the appellant had, by use or by prescription, acquired an easement, a right to pass to and from his land, along the line aforesaid and over the appellee's land; that there had never been any fence prior to the time (January, 1893), when it was alleged appellant tore one down "at the place where it was pleaded the trespass in this particular was committed, and that he removed the fences then and there, and at the other times stated in the petition, for the reason that they constituted obstructions to the road or highway and barred him from the rightful use and enjoyment thereof. To this answer a reply was filed, and of the issues joined a trial resulted in a judgment for the plaintiff, from which the defendant has appealed to this court.

Counsel for appellant contend that the findings and judgment of the trial court were not sustained by the evidence and were contrary to the weight thereof; and that under the rules of law applicable to the facts as they appeared in the evidence, the judgment was erroneous. It was undisputed that no plat of any road on the half-section line in question had ever been made or recorded; and further, that no work had ever been done by the public or at public expense, on the line as a road. A number of persons who had known the section in the early days and years of the settlement of Seward county, and some of them during the years which had intervened to the time of the trial, and others of them only during portions of such time, were sworn and testified in regard to the land of section 26 and the roads across it, and more particularly the parts of the section which, at the time of the trial, belonged to appellee. It appeared in evidence that

twenty-three or more years prior to the date of the trial the land was "raw" or uncultivated prairie, and, as some of the witnesses in substance expressed it, "Everyone had a road, or drove wherever his fancy or necessity dictated." There were few fixed roads, but many "trails or tracks" as they were called. Several of the witnesses state in respect to the road across the land of appellee, in the early years of the settlement, substantially as did one called for defendant, that "they did not travel along on the half-section line, but used to angle across the land." It further appeared that the travel over this land was in the main, at first, by parties going to the river, which ran along near the other side of the section from that where the land afterwards purchased by the appellee was situated, to reach the timber which stood there, to cut it for fuel, or buy it of persons who had cut it and had the wood for sale, and haul it home by way of these same prairie roads or "tracks" by which they had come; and by others driving to a place at or near the one end of this half-section line, where the river was fordable or where there was a ford. Some years subsequently, probably during the year 1883 or 1884, a dam was built in the river at a point below the ford, by the effect of which the water at the fording place was so deepened that it was not a safe crossing and people ceased the use of the ford and there was a consequent partial or entire cessation of travel by the general public on the road across the land of appellee and other portions of section 26. At a time between the beginning of travel across the section and its partial ceasing because of the destruction of the ford, some of the land had been plowed and the course of what was designated by the witness as the "angling road" was changed. Three or four years after the road was not generally used, because it was no longer the approach to a ford in the river, fences were made on portions of section 26, and some bars or gates were placed wherever the fences intersected the road in question, there being bars where a traveller would first come upon appellee's

land. The appellant had put up and maintained a gate at the end of the alleged road on his land, which he had kept open or closed as his convenience demanded, leaving it open when he had no live stock in the field through which the road ran, and closing it when the stock was there. The party who owned the land prior to the appellee purchased it in 1887, and during the month of August of the year 1889 did some fencing by which the course of the road, or track, on the land afterwards owned by appellee, was materially changed. The foregoing are but general statements of some of the main facts disclosed by the evidence. There were many others which gave material support to the contention of either party to the suit, and as to many points the evidence was conflicting, but it was sufficient to sustain a finding that there had not been a use of the half-section line by the public as a road, for the length of time and such as constituted it a public highway. Had the road been along on the half-section line during the time the land remained wild unenclosed prairie, no rights would have accrued to the public by its mere user. (*Graham v. Hartnett*, 10 Neb., 517; *Rathman v. Norenberg*, 21 Neb., 467; *Shaffer v. Stull*, 32 Neb., 94; *Nelson v. Jenkins*, 42 Neb., 137; *Smith v. Smith*, 34 Kan., 293; *State v. Horn*, 35 Kan., 717; *Sutton v. Nicolaisen*, 44 Pac. Rep. [Cal.], 805.)

It is sustained by the evidence that after cultivation of the land commenced the travel over it was in such tracks and directions and under conditions dictated by the owner of the land, and not under a claim of right of a road, and adverse to the rights and control of the owner. Such user, if continued for ten years or more, would not establish a highway by prescription. (*Elliott, Roads & Streets*, 137; *Shellhouse v. State*, 110 Ind., 509; *Alton v. Meeuwenberg*, 66 N. W. Rep. [Mich.], 571; *Gray v. Haas*, 67 N. W. Rep. [Ia.], 394; *Stewart v. Frink*, 55 Am. Rep. [N. Car.], 618.) In regard to the appellant's claim that he was entitled to a private road or way over appellee's land and along the half-section line, the evidence supports the

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finding, which must have preceded the judgment rendered by the trial court, that no such right existed. If there was any, it was gained by prescription, and the trial judge was warranted in concluding that there had not been ten years' uninterrupted user of the line as a road or way by appellant under a claim of right as against the owners of the land; and that there had not been an adverse enjoyment or user,—a use of the way which was not subject to the direction or will or pleasure of the owner; and this being true, no easement had been gained. (2 Washburn, Real Property [4th ed.], 321, 322; *Zigefoose v. Zigefoose*, 28 N. W. Rep. [Ia.], 654.) It follows that the judgment of the district court is

AFFIRMED.

RUDOLPH R. GROTTÉ V. SIEGFRIED NAGLE ET AL.

FILED JANUARY 19, 1897. No. 6972.

1. **Pleading:** LEAVE TO AMEND: ITEMIZED STATEMENT. A motion was made, and sustained, that plaintiff be required to attach to his petition an itemized statement of the account for goods sold and delivered, the basis of the action. The plaintiff filed an amended petition, which declared on an account for money loaned. A motion to strike the amended petition was filed, one of its grounds being plaintiff's non-compliance therein with the order of the court in regard to the itemized statement. This last motion was overruled. *Held*, That such action was equivalent to leave granted to file the amended petition.
2. ———: AMENDMENTS: WAIVER OF OBJECTIONS. A motion to strike an amended petition from the files on the ground that it declared upon or introduced a cause of action new and different from that pleaded in the original petition was overruled. The defendant then answered to the merits of the action set forth in the amended petition and participated in a trial thereof. *Held*, That the right to further complain that a new cause of action was set forth in the amended petition was waived.
3. **Attachment Affidavit.** An attachment affidavit must contain a statement of "the nature of plaintiff's claim." (Code of Civil Procedure, sec. 199.)

4. ———. A statement in such an affidavit for attachment that the action is one "upon an account for goods sold and delivered by plaintiff to defendant at his request" was sufficient to show that the action was one in which an attachment might issue and to give the court jurisdiction of the attachment suit. The statement that it was on an account was a general description of the plaintiff's claim, and the further words which we have quoted served to designate the kind of an account.
5. ———: REFERENCE TO PETITION. If the claim appears from the statements of the affidavit to be one for which an attachment is authorized, but its nature is not fully set forth, reference may be had to the petition. (*Hart v. Barnes*, 24 Neb., 782.) RAGAN, C., dissenting.
6. ———: PETITION: VARIANCE. Where an attachment affidavit varies from an amended petition in the statement of the specific kind of an account in suit, and the defendant, by answering the amended petition and taking part in a trial of the issues joined, has waived the right to further object to the error, if any, in allowing the amended petition to be filed, in which it was claimed that a new cause of action was introduced, in that in the amended petition an account different in its particular character from that pleaded in the original petition was declared upon, *held*, that inasmuch as a reference to the petition would disclose the precise nature of the account, and hence the action could be pleaded in bar of a second attachment on the same account, the court did not err in overruling a motion to discharge the attachment on the ground, in substance, that it did not state the nature of plaintiff's claim as contained in the amended petition.
7. ———. It is required in section 199 of the Code of Civil Procedure that in an attachment affidavit there should be set forth "the amount which the affiant believes the plaintiff ought to recover." *Held*, That a slight variance in the amount stated and that actually due is immaterial, and not a fatal defect in the affidavit.
8. Attachment: UNMATURED CLAIM. It is not ground for the discharge of an attachment that some portion of the sum stated in the affidavit is not due.
9. ———: ———: PROOF. The proof in the attachment suit adjudged sufficient to support the finding of the court sustaining the attachment.
10. ———: ———: DISMISSAL. It appeared that one item in the suit, as to which there was a distinct paragraph, separately numbered, in the petition, was not due at the time the action was commenced. *Held*, That the court did not err, at the time of rendering judgment, in sustaining a motion by plaintiff to dismiss the suit as to such item, without prejudice.
11. Pleading: AMENDMENT. An amendment of a pleading to conform

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to proof *held* proper in view of the facts in regard to such item, as disclosed by an examination of the petitions in the action.

12. **Reference: ADDITIONAL FINDINGS.** The action of the trial court in returning the case to the referee for further finding in respect to the item as to which the petition was allowed to be amended to conform to the proof, and the reception of a supplemental report containing such finding and its consideration in the final settlement of the issues, approved.
13. ———: ———. The evidence adjudged sufficient to sustain the findings and judgment.

ERROR from the district court of Douglas county.
Tried below before HOPEWELL, J. *Affirmed.*

Montgomery, Charlton & Hall, for plaintiff in error.

Joel W. West and Charles Ogden, contra

HARRISON, J.

The defendants in error (hereinafter styled the plaintiffs) commenced this action against the plaintiff in error (hereinafter designated defendant) in the district court of Douglas county to recover the sum of \$——, alleged to be the plaintiffs' due as the result of certain business transactions between the parties. An affidavit was filed and a writ of attachment procured to issue, which was levied on a stock of liquors, etc., as property of the defendant. After issues joined the case was referred, and the referee heard the testimony and filed his report, and, subsequently, what was known in the record as a "supplemental report." The court, after hearing on the exceptions of the defendant to the reports of the referee, overruled the objections, confirmed the reports, and rendered judgment for the plaintiffs. During the pendency of the action a motion to discharge the attachment was filed for defendant, and, on hearing, was overruled. By leave of court a second motion was filed to discharge the attachment, of which, on hearing, a similar disposition was made as had been of the first. In the original petition filed in the action the declaration of the plaintiffs' cause

was "that on or about the — day of —, 1891, plaintiffs sold and delivered to the defendant, at defendant's special instance and request, goods, wares, and merchandise aggregating in value the sum of \$7,500, and at the agreed price of \$7,500." To this counsel for defendant filed a motion that plaintiffs be required to make the petition more definite and certain, by attaching thereto an itemized statement of the goods alleged to have been sold to defendant. This motion was sustained, and leave granted plaintiffs to file an amended petition. What was marked an "amended petition" was filed, in which the cause of action was stated to be for money loaned to defendant, at times specified. Counsel for defendant moved the court to strike the pleading denominated an "amended petition" from the files, for the reason that it was not a compliance with the order of the court, but by its allegations sought to substitute a new cause of action, other and different, and in place of that originally pleaded. On hearing, the court overruled this motion. After motion filed to require the amended petition to be made more definite and certain a second amended petition was filed, in which the burden of the charge was for money loaned to defendant. To this defendant filed an answer, to which there was a reply, and of the issues joined a trial, as we have hereinbefore stated.

It is urged that the court erred in not sustaining the defendant's motion to strike the first amended petition from the files, first, because it did not comply with the order of the court, which was that an itemized statement of the goods alleged in the original petition to have been sold to defendant should be thereto attached; and second, for the reason that it was not an amendment of the petition, but declared upon a new and independent cause of action. In regard to the first, it may suffice to say that the action of the court in overruling the motion to strike, to the extent it involved this reason, was equivalent to a grant of leave to file the amended petition, for it allowed it to remain on file as an authorized pleading. On the

second ground on which it was sought to strike the amended petition from the files, it must be said that the point raised, that the pleading which it was sought to eliminate from the record was based upon a new cause of action, independent of that stated in the original petition, we need not discuss or settle, for when the defendant's motion to strike out on this ground was overruled, and he pleaded and finally answered to the merits and participated in the trial of the issues presented, his actions constituted a waiver of the right to further complain that the amended petition was (if such was the fact) an attempt to substitute or introduce a new cause of action. (1 Ency. Pleading & Practice, 573; *Sauter v. Leerridge*, 15 S. W. Rep. [Mo.], 981, 103 Mo., 615; *Erens v. Hall*, 1 Handy [O.], 434; *Glover v. Flowers*, 7 S. E. Rep. [N. Car.], 579, 101 N. Car., 134; *Bachop v. Hill*, 54 Vt., 507; *Snyder v. Harper*, 24 W. Va., 212.)

It is contended that the first motion to dissolve the attachment should have been sustained: "First, because no affidavit was filed with the amended petition, nor was the original affidavit amended to conform to the allegations contained in such amended petition; second, because the affidavit did not state the exact amount which the plaintiffs demanded, as set forth in the amended petition; and third, because the evidence adduced on the hearing of the motion to dissolve the attachment did not disclose a state of facts sufficient to sustain the attachment." Under the head of the division of argument designated "First" is presented the question of the sufficiency of the statement in the attachment affidavit of "the nature of the plaintiffs' claim," that this shall be stated in the affidavit, being one of the requirements of the statute. (Code of Civil Procedure, sec. 199.) The affidavit in attachment, in this particular, was as follows: "Upon an account for goods sold and delivered by the plaintiffs to defendant, at his request." This was a description of the nature of the plaintiffs' claim which warranted the proper officer in issuing the writ of attachment, and suffi-

cient to give the court jurisdiction in the attachment proceedings. (*Tessier v. Reed*, 17 Neb., 105; 1 Shinn, Attachment & Garnishment, p. 225; *Theirman v. Vable*, 32 Ind., 400.) The general nature of the claim was set forth in the words "on account," and disclosed, without other or further statement, that the cause of action was one on which an attachment might issue. If there had been nothing more in the affidavit in regard to the nature of the claim, reference might have been made to the petition, and if a sufficient statement appeared in it, the attachment affidavit should have been upheld as sufficient in its allegations of the nature of the claim.

In the decision of the case of *Phelps v. Young*, Breese [Ill.], 327, it was said: "The proceeding must be considered as one against a non-resident debtor, and all the forms of the statute appear to have been complied with, unless the affidavit upon which the attachment was sued out should be defective in not sufficiently specifying the nature of the indebtedness. The statute requires that the plaintiff in the attachment shall specify in his complaint, on oath or affirmation, the amount and nature of the indebtedness of the defendant. The deposition sets out that Phelps is justly indebted unto the plaintiff in the sum of fourteen hundred dollars, by his certain instrument of writing, signed by him, and the question is thus presented for determination whether this is the description or specification intended by the statute. It would seem, at a first examination of the object of the act, that there was not that compliance with its spirit in the specification given as its framers intended, but when it is recollected that the plaintiff has filed his declaration, in which the entire cause of action is fully set forth, the objection loses its force." (See, also, *Hart v. Barnes*, 24 Neb., 785.) The affidavit in the case at bar contained the further terms descriptive of the claim, "For goods sold and delivered by the plaintiffs to defendant, at his request," but these were merely of the kind of an account sued upon, and that they were wrong and ap-

peared there by mistake of the pleader, or rather his lack of knowledge at the time of the institution of the suit of the specific kind of an account on which it was predicated, did not work a lack of jurisdiction of the court in the attachment and could not govern in its disposition on a motion to discharge it. The original petition in the action declared upon an account for goods, wares, and merchandise sold and delivered, etc.; and the amended petition, upon the disputed allegations of which, together with other issues presented by the further pleadings, the cause was tried, set forth an account for money loaned. It will be borne in mind that the defendant waived his right to maintain his objections to the change in the amended petition from an account for goods sold and delivered, as pleaded in the original, to an account for money loaned, and that the case was finally tried and adjudicated as a suit on an account of the character last mentioned. The attachment affidavit was not amended to meet this change in the petition, but remained as originally filed throughout the progress and disposition of the cause; but the amended petition and affidavit were based on an account as the claim of action, and a resort to the amended petition, which, as we have seen, would be proper for a specific description of the account in suit, would definitely disclose such character and so identify and connect them that this action, in both its branches, could be invoked as a bar to any further proceeding by way of main or ancillary suit on the same account. This, it would seem, should be sufficient, and this branch of the contention must be declared of no avail.

Under the second point of the argument, in respect to the motion to discharge the attachment, it is urged that in the affidavit it was stated that the amount which the plaintiffs believed they should recover was \$7,500, while in the amended petition but \$7,428.67 was claimed due the plaintiffs; that this was such a variance between the two pleadings as was fatal to the affidavit, and furnished sufficient reason for the dissolution of the attach-

ment. The requirement of the statute as to statement of amount (Code of Civil Procedure, sec. 199) is that in the affidavit there shall be set forth "the amount which the affiant believes the plaintiff ought to recover." We think, under this provision, the statement in the affidavit of the amount did not differ sufficiently from that pleaded in the petition to vitiate the affidavit. The variance in the amounts stated was but slight, and was immaterial. (1 Shinn, Attachment & Garnishment, pp. 213, 214; *Paul v. Ward*, 21 Ind., 211; *Lathrop v. Snyder*, 16 Wis., 293; *Aultman v. Daggs*, 50 Mo. App., 280; 3 Ency. Pleading & Practice, p. 15.)

The third proposition of this portion of the argument was that the evidence introduced on the hearing of the motion to discharge the attachment was insufficient to warrant the court in its ruling by which it sustained the attachment. An examination of the evidence on this branch of the case convinces us that there was sufficient to sustain a finding that the defendant was acting as it was shown he did, with the intent stated in the attachment affidavit in regard to creditors, and more particularly the plaintiffs; hence the court did not err in refusing to discharge the attachment on the facts.

In a second motion to discharge the attachment, which was filed and considered, it was alleged as cause for such discharge that the "testimony of the plaintiffs shows that a portion of the alleged indebtedness of the defendant to the plaintiff was not due at the time this action was commenced, and no order allowing an attachment was granted by this court or any judge thereof." The facts were as set forth in the foregoing ground of the motion; but this was not sufficient to call for a discharge of the attachment. In the opinion of this court in the case of *Tessier v. Englehart*, 18 Neb., 167, it was said: "It is not a fatal objection to an attachment that it may be deducible from an examination of the petition or bill of particulars that some part of the amount stated in the affidavit for attachment is not yet due." And in the text

of the opinion appears the following: "The third objection to the affidavit for attachment is that it states plaintiffs 'ought to recover the sum of \$1,963.19, now due and payable,' while the petition shows that there was only \$1,637.88 due at the time of the commencement of the action. This constitutes no objection to the proceedings, but if the plaintiffs in the court below knowingly and willfully attached a greater amount of goods than was necessary to pay their debt then due, with costs and expenses, they would probably be liable in damages." (See, also, 1 Shinn, Attachment & Garnishment, 212, 213.)

In the claim of plaintiffs as stated in the several petitions there was included one item of \$2,200 which, it developed during the trial, was not due until March 16, 1892, and as the action had its inception of date March 15, 1892, the portion of the account to which we have just referred had not matured at the time of the commencement of the action, and the case, as to this, was prematurely brought. It also appeared, or was of the findings of the court at the time judgment was rendered on the report of the referee, that this item, or claim, was not owned by plaintiffs when the cause was instituted. At the time of rendering judgment the court entertained and sustained a motion of plaintiffs to dismiss without prejudice as to this part of the cause of action, and such dismissal was entered, of which counsel for defendant complain, insisting that inasmuch as the matters in controversy had been submitted for adjudication, all should have been retained and settled. The facts in respect to the amount of \$2,200 of plaintiffs' claim were such that the court could not consider and adjudicate upon its merits, and it was entirely proper to allow or to enter a dismissal as to it, and without prejudice, as was done.

Subsequent to the time of the trial before the referee, and the filing of his report, the plaintiffs asked and were granted leave to amend, by interlineation, what was styled in the motion the "second amended petition," by inserting therein a paragraph declaring upon an item or

claim of \$1,600, to conform the pleading to the proofs, and on motion of plaintiffs the cause was returned to the referee for a further report, or a finding in regard to this particular item of \$1,600, and the referee made and filed a supplemental or second report, confined to his conclusions as to the one item of \$1,600. Counsel for defendant contend that it was error to send the case back to the referee for further report, and, when made, to consider the report. If it appeared that the report filed was incomplete in any respect, it certainly was not erroneous to call upon the referee for the further information to the extent it would serve to complete and perfect the report, nor improper to consider the further matter when furnished. In this connection it was also argued that the court should not have allowed the plaintiffs to amend and include the item of \$1,600, as it brought into the case a cause of action, or part of a cause of action, which was not of it at its commencement, thus making the attached goods pay a claim for which they were not taken under the writ. An examination of the pleadings discloses that the aggregate of the amounts as pleaded and claimed by plaintiffs to have been loaned to defendant, the credits stated, and the balance alleged to be due, were the same as in the first amended petition and the second amended petition; that these conditions of the pleadings were not changed by the amendment of the second so that it included the item of \$1,600, stated in a separate paragraph thereof, from which we conclude that this sum of \$1,600 was at all times embraced in the aggregated amounts of the pleaded claim in the petitions, from which the credits were deducted, hence always entered into the calculations and figuring from which the balance demanded as a recovery was reached or determined; and that by an omission on the part of the pleader it was not, in the first instance, directly set forth in the specific portion of the petitions, as it should have been. This particular item was the subject of proof in the trial, was of the contested issues, and in view of all the facts and circumstances in

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regard to it, which we have in the main outlined, it was not improper or erroneous to allow the amendment. It would not prejudice the rights of defendant and was but fair and just to plaintiffs.

It is further urged that the trial court erred in overruling the defendant's exceptions to the referee's reports, and in approving and affirming such reports. Under this heading the weight, sufficiency, and effect of the evidence in the case are argued. We have carefully read and considered the record, and do not deem it necessary to enter into a discussion of the evidence here. We determine from it that the findings and conclusions of the referee and the judgment of the trial court were sufficiently sustained thereby and will not be disturbed.

We have noticed all the points presented for review, and it results, from what has been herein announced, that the judgment of the district court will be

AFFIRMED.

J. E. COBBEY V. ANNA C. DORLAND ET AL.

FILED JANUARY 19, 1897. No. 7017.

- 1. Insurance: TOTAL LOSS: ATTORNEYS' FEES: NOTICE OF LIEN.** In an action against an insurance company on its policy insuring property against loss by fire, when the property insured thereby has been totally destroyed by fire, it is provided by statute that the "court, upon rendering judgment against an insurance company on any such policy of insurance, shall allow the plaintiff a reasonable attorney's fee, to be taxed as a part of the costs." In such an action the summons was indorsed as follows: "If the defendant fail to appear and answer, the plaintiff will take judgment for \$800, together with interest at 7 per cent from September 26, 1893, and attorney fees and costs of suit. Attest: R. W. Laffin, Clerk. By Orlando Swain, Deputy." *Held*, That such indorsement was not a notice of plaintiff's attorney's claim of a lien for fees for his services performed in and about the suit, and further, that service of the summons so indorsed on the company did not convey notice to it of such claim of lien.

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2. ———: ———: ———: DISMISSAL: INTERVENTION. The attorney who instituted the suit for plaintiff applied to the trial court to be allowed to intervene and prosecute against the company his claim for fees. *Held*, That of the evidence filed in the matter of this application there was sufficient to sustain findings that there had been a dismissal of the action against the company, and a settlement and extinguishment of the plaintiff's claim against it, prior to any notice to it of any claim of the attorney's lien for fees; hence the denial of the application was not erroneous.

ERROR from the district court of Gage county. Tried below before BABCOCK, J. *Affirmed*.

J. E. Cobbey, pro se.

References: *German Ins. Co. v. Eddy*, 36 Neb., 461; *German Ins. Co. v. Penrod*, 35 Neb., 273; *Kansas P. R. Co. v. Thacher*, 17 Kan., 101; *Smith v. Chicago, R. I. & P. R. Co.*, 56 Ia., 720; *Ins. Co. of North America v. McLimans*, 28 Neb., 657.

Alfred Hazlett, contra.

HARRISON, J.

An action was commenced in the district court of Gage county for the plaintiff by the intervenor, as her attorney, in which it appeared in the petition filed that she, as mortgagee of certain property in Beatrice, was entitled to the amount of the insurance thereon, evidenced by a policy issued by the Ætna Insurance Company of defendants, the property having been totally destroyed by fire. The petition in the action was filed of date December 30, 1893. Subsequently, pursuant to a settlement of the disputed questions in the case, A. L. Green claiming to represent the plaintiff during such adjustment, the following statement was filed:

"Now comes the plaintiff and dismisses the above entitled action without prejudice to future action at her costs.

ANNA C. DORLAND,

"By A. L. GREEN, *Agent*."

This was filed January 19, 1894. Of the same date the intervenor filed the following:

"All parties will take notice that the pretended dismissal filed in this case is without authority and that I still have and claim the sum of \$100 as attorney's fees for services rendered in this case, as alleged and claimed in the papers heretofore filed and the notice heretofore given.
J. E. COBBEY."

And on January 26 he filed a motion by which he asked to intervene. This motion was accompanied by a petition in which appeared a statement of his claim for an attorney fee. The insurance company filed objections to the allowance of the intervention, affidavits were filed in support of the contentions of the parties respectively, and on presentation of the matter to the court the application to intervene was denied. The party who sought to intervene asks a review in this court of the action which resulted in the refusal to him of such right.

That notice of the attorney's claim of a lien for fees must be brought home to any party as against whom it is sought to be made effectual, is not questioned, but it is urged that the requisite notice of such claim of lien was given the insurance company by an indorsement which appeared on the back of the summons served. The indorsement referred to was as follows:

"If the defendant fail to appear and answer the plaintiff will take judgment for \$800 together with interest at 7 per cent from September 26, 1893, and attorney fees and costs of suit.

"Attest: R. W. LAFLIN, *Clerk*,

"By ORLANDO SWAIN, *Deputy*."

The claim against the insurance company was for a total loss by fire of a building insuring which it had issued a policy, and in such an action "The court, upon rendering judgment against an insurance company upon any policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of

the costs." (Compiled Statutes, ch. 43, sec. 45.) An inspection of the section which we have just quoted develops clearly that the amount to be allowed at the time judgment is rendered in a suit on a policy, as an attorney's fee, as part of the costs, is to be to the plaintiff in the action and not to his attorney. The indorsement on the summons in this case hereinbefore set forth was without doubt a statement, in short, of the plaintiff's claims in the action. It had none of the requisites of a notice of a claim of lien. It did not, either directly or indirectly, refer to the attorney or his fees, and was not signed by him either for himself asserting any claim or in his representative capacity as attorney for the plaintiff. It did not purport to emanate from the attorney or to any extent or degree set forth his rights to fees in the case, and cannot, by any allowable construction, or by intendment, be said to convey a notice of an attorney's claim of lien in the action for fees.

We are cited to the opinion in the case of *Smith v. Chicago, R. I. & P. R. Co.*, 10 N. W. Rep. [Ia.], 244, as authority for the contention that the notice of attorney's lien might be written on, or in, the summons, and thus served with it. It is therein stated: "The defendant claims that the notice of the lien upon which the plaintiffs rely is insufficient. The notice was inserted in the original notice and the service of it was made in connection with the service of the original notice. The objection is based upon the ground that the original notice can have but one office, and that is to bring the defendant into court, and that anything inserted in the notice not pertinent to this purpose is foreign and extraneous, and ought not to be treated as having any force. The statute simply requires the notice to be given in writing. In this respect the notice given conformed to the statute. It was not a part of the original notice but was written in a blank space between the parts of the original notice. If it had been written upon the margin below the original notice and properly signed, we think no question could

be properly raised as to its sufficiency. The case, in our opinion is not essentially different. To hold that it is would be giving more force to a mere matter of form than we feel justified in doing." From the foregoing we gather that the statement of the claim of lien must, in that case, have been sufficient. As we have seen, it was not in the case at bar, hence the case cited is not in point.

In the affidavit of A. L. Green, who acted as agent for the plaintiff in the matter of compromise with the insurance company, appeared the following: "Affiant says that the said J. E. Cobbey, before said case was dismissed on the 19th day of January, 1894, told this affiant to go on and dismiss said case, or do with it as he pleased; and affiant further says that the said J. E. Cobbey instructed this affiant as to the form, or the substance which should be contained and set forth in a dismissal of this case, all of which plaintiff used and made, and had the same filed on said 19th day of January aforesaid." This statement is not directly contradicted or denied. There are, however, some facts asserted in the affidavit of the intervenor somewhat inconsistent and conflicting therewith, but, coupled with other evidence on the same question, the foregoing statement fully sustained a finding that the dismissal, as made, was proper and binding on all parties concerned, including the intervenor, and there was evidence which supported a further finding that no notice of the attorney's claim for lien was given to the insurance company prior to the time of the extinguishment of its liability to the plaintiff by the completion of the settlement. This being true, no lien could accrue (*Sheedy v. McMurtry*, 44 Neb., 499, and citations therein), and the trial court did not err in denying the request for intervention. The judgment of the district court is

AFFIRMED.

CAROLINE A. ESTABROOK, EXECUTRIX, APPELLANT, V.
SAMUEL STEVENSON ET AL., APPELLEES.

FILED JANUARY 19, 1897. No. 6924.

Landlord and Tenant: REPAIRS: RECEIVER. Real property was leased for a term of ten years, an option reserved to the lessor to terminate it at the end of five years. The lessor elected to put an end to the lease at the close of the shorter period, and took the necessary steps to effect his purpose. This was resisted by the lessee, and during the course of the litigation which ensued the lessor made application for the appointment of a receiver to take charge and care of the property and collect the rents. This was granted, and subsequently the court was asked to order the receiver to pay some accounts due parties for material furnished and work performed in repairs to the property ordered to be made by the lessee and completed prior to the appointment of the receiver. This request was granted. No liens had been perfected against the property for the amounts of the accounts. *Held*, Not to be charges against either the property or the rent money in the hands of the receiver, but individual debts of the lessee, and that the order to the receiver to pay them was erroneous.

APPEAL from the district court of Douglas county.
Heard below before FERGUSON, J. *Reversed*.

Estabrook & Davis, for appellant.

A. C. Wakeley, *contra*.

HARRISON, J.

It appears that on May 1, 1884, Experience Estabrook leased to Samuel Stevenson certain real estate in the city of Omaha for the term of ten years, with the privilege reserved to the lessor of terminating the lease at the expiration of five years of the term; that by a provision of the lease the lessor, at the termination of the term, should pay the lessee for such improvements as had been made or placed on the real estate by the lessee during the life of the lease, the value of such improvements to be determined by arbitrators. The lessor gave notice of his election to terminate the lease at the end of the five years,

arbitrators were chosen as had been provided, who made an award, to which the lessor objected and filed his petition in the district court of Douglas county setting forth the facts. To the petition the lessee and the party to whom he had conveyed his rights in the premises answered, and of the issues joined there was a trial and a resulting judgment, by which it was established that the lease had been terminated at the end of the five years. The award of the arbitrators as to the value of the improvements was set aside, and the court in its decree adjusted this and other matters. From this judgment an appeal was taken to this court by Samuel and Mary Stevenson. During the pendency of the appeal, Experience Estabrook made application to the district court for the appointment of a receiver to take possession of the property, to have the charge thereof, to collect the rents and retain the same subject to the orders of the court. This application was made of date November 18, A. D. 1893, and was resisted by the Stevensons. But on final hearing, December 30, 1893, the application was granted and a receiver appointed, who qualified, gave his bond, and assumed his duties. On November 30, 1893, during the pendency of the application for, and before the appointment of, the receiver, the building of the leased property was damaged by fire and certain repairs rendered necessary to again put portions of the premises in a fit condition for occupancy. Some of the repairing was done by parties employed by Stevenson, other parts of the necessary work he executed himself, all being completed before the appointment of the receiver. It is stated in Stevenson's affidavit that the full rent for the month of December, 1893, would have been \$125, but it was lessened by reason of the injury to the building by fire to the sum of \$42, which he retained to pay him for his own personal services in repairing the building. Subsequent to his appointment, an application was made for an order of the court directing the receiver to pay, out of rent moneys collected by him, the accounts of parties for ma-

terial used and labor performed in and about the repairs on the property of the injuries caused by the fire, and which were made and completed prior to his appointment. This application was supported by affidavits, and on hearing, February 24, 1894, was sustained and the receiver ordered to pay the accounts. From this order an appeal to this court was perfected for Experience Estabrook, who has since died, and the cause has been revived in the name of his executrix, Caroline Estabrook.

There is but one brief filed in the cause, that for appellant. The appeal was prosecuted by virtue of the provision of section 275 of the Code of Civil Procedure, wherein appears the following: "All orders appointing receivers, giving them further directions, and disposing of the property may be appealed to the supreme court in the same manner as final orders and decrees." The repairs were made and the debts contracted before the property was in the custody of the court or its receiver, and not by order of either court or receiver. The parties making them had no lien or claim against the premises, so far as this record discloses, and the accounts were not liens or charges on or against the fund in the receiver's hands of rents collected after he took charge of the property. The repairs were ordered by and made for Samuel Stevenson, and, unless liens had been perfected against the property, they had no other or further character than bills against him, and were accounts of his individual or personal indebtedness. We can discover no tenable grounds upon which the order to the receiver to pay these accounts from the rent money in his hands could be based. It was erroneous and must be reversed and the application for the order denied.

JUDGMENT ACCORDINGLY.

IRVINE, C., not sitting.

HOME FIRE INSURANCE COMPANY OF OMAHA V. RICHARD
WOOD ET AL.

FILED JANUARY 19, 1897. No. 6863.

1. **Mistake: REFORMATION OF CONTRACT.** To justify the reformation of a written contract for mistake, the mistake must be mutual and be established by clear, convincing, and satisfactory evidence.
2. **Insurance: REFORMATION OF POLICY.** Evidence examined, and *held* insufficient to authorize the reformation of the policy in suit.
3. ———: **OTHER POLICIES: INDORSEMENT.** Where an insurance company issues a policy with knowledge of other insurance on the same property, it cannot escape liability on the ground that no memorandum of the prior insurance was indorsed on the policy.
4. ———: ———: **NOTICE.** A statement by the insured to the agent of the insurer that the former intends to procure additional insurance on the property is not notice of the existence of such additional insurance when obtained.
5. ———: ———: **BREACH OF CONTRACT.** A fire insurance policy provided that it should be void if other insurance was subsequently obtained without the consent of the company. The insured did thereafter procure other insurance on the same property, without such consent or knowledge of the insurer of its existence. *Held*, That there was a breach of the condition of the first policy, and a recovery cannot be had thereon.

ERROR from the district court of Douglas county.
Tried below before FERGUSON, J. *Reversed*.

B. G. Burbank and Jacob Fawcett, for plaintiff in error.

Charles B. Keller, *contra*.

NORVAL, J.

This was a suit to reform a policy of fire insurance, and for judgment on the policy when so corrected and reformed. The court found for plaintiffs, reforming the policy and entering judgment for the full amount of insurance, with interest and costs. The only assignment urged for a reversal is the one which challenges the suf-

ficiency of the evidence to sustain the finding and judgment.

The facts may be briefly summarized thus: Wright Bros., on and for some time prior to June 27, 1891, were, and had been, engaged in the mercantile business at Fairfield, and B. F. Hyde was the soliciting agent at said place for the Home Fire Insurance Company of Omaha, with power to solicit applications for insurance, transmit them to the home office at Omaha, where the policies were written, and on the receipt of the policies by Mr. Hyde, he delivered the same to the insured and collected the premiums. On the date aforesaid, Hyde solicited insurance of Wright Bros. on their stock of merchandise and store fixtures in the sum of \$1,000 for the period of one year. The policy was prepared and executed by the proper officers of the defendant company in Omaha, after which it was transmitted to Mr. Hyde, who thereupon delivered the same to Wright Bros., and collected the premium thereon. The policy contained a provision that "this policy shall be void * * * if there is now, or shall hereafter be, obtained any other insurance (whether valid or not) on said property or any part thereof;" and further, that "no agent or employe of this company, or any other person or persons, have power or authority to waive or alter any of the terms or conditions of this policy, or make any indorsements thereon, except only the secretary of this company, and any waiver or alteration by him must be in writing, and must be signed by him." The property covered by the policy was wholly destroyed by fire on December 8, 1891, and at that time the insured were carrying a total insurance of \$5,500, \$2,000 of which was in force when this policy was given, and Hyde then knew it, but the policy in suit contained no stipulation permitting other concurrent insurance. After the loss the policy was assigned to plaintiffs. The company defends on the ground of the obtaining additional insurance, subsequent to the issuance of the policy, without notice thereof to it, or making any request that consent

therefor be given. On the other hand, plaintiffs alleged in their petition, in effect, that at the time the insurance was written it was agreed between Wright Bros. and the company that plaintiffs were to be permitted to carry \$5,500 total insurance on the property; that without any fault or neglect of theirs, but through design or mistake of the defendant, or its agent, the company omitted to write in the policy, or to indorse thereon, any provision for concurrent insurance, and that said policy was received and the premium paid Wright Bros. in good faith without reading the same, believing that the policy contained the proper and necessary provisions permitting concurrent insurance. This averment was put in issue by the answer.

The question involved is whether the evidence was sufficient to justify the reforming of the policy relative to additional insurance. The only testimony adduced on that branch of the case by plaintiffs was given by B. J. Wright, one of the insured, and is as follows:

Mr. Hyde came to me several times before we made out the policy, or gave him a right to make it out, and wanted to take out a policy in the Home for \$1,000, and tried to get us to take out more in that company.

Mr. Fawcett: State what he said. Don't give your conclusion.

A. Well, he said he wanted us to take out more insurance,—make the policy larger; and at that time I told him that I did not see fit to do that, but we intended to replenish the stock and take out more insurance afterwards, which we did, and stated to him about the amount that we intended to carry, which at that time I told him that we intended carrying about \$5,500; and a few days after he had been several times, I told him to make out a policy for \$1,000, and told him the amount of insurance we had then, and what we intended to get.

Q. How much insurance did you then have upon that stock at the time this policy was written?

A. \$2,000.

Q. State whether or not you told Mr. Hyde what companies that insurance was in, and whether you showed him the policies or not.

A. I do not remember whether I showed him the policies or not, but think I told him the companies it was in, and the amount.

Q. And how much insurance do you swear that you told Mr. Hyde at that time that you wanted to carry on that stock, and intended to carry on that stock?

A. \$5,500.

Q. What, if anything, did you say to Mr. Hyde with reference to renewing the policy in the German-American, and taking it out for \$1,500 instead of \$1,000?

A. Why I think I told Mr. Hyde about the running out of this policy that Mr. Randall carried, and that I was going to renew it with an additional amount of \$500 or \$1,000. I do not remember just the words that we used at that time; we had several talks about it. * * *

Q. When you received this policy what was done with it?

A. I received it and put it in the safe with the balance of them.

Q. State whether or not you examined or read over that policy at the time you received it.

A. No, sir; I did not.

Q. When did you first read over and examine that policy?

A. The next day after the fire.

Cross-examination:

Q. Did you ever at any time, after this policy was delivered to you, direct the defendant company or any of its agents to make any indorsements upon the policy for additional insurance?

A. I did not.

Q. Did you ever at any time after you put on the additional \$500 insurance in the German-American, and before the fire, notify the defendant company, or any of its agents, that you had done so?

A. No, sir; I did not.

Q. Did you ever at any time after obtaining that additional \$500 insurance in the German-American request the defendant, or any of its agents, to indorse permission for such additional insurance upon your policy?

A. Not that I remember of.

It is also admitted of record that prior to the fire no request was made of the company by the insured to indorse any provision upon the policy permitting additional insurance. B. F. Hyde testified that he was a soliciting agent of the defendant, issued no policies for them, and made no indorsements thereon, and had no authority to do so; that he had no recollection, at the time he solicited this insurance, of B. J. Wright telling him it was the intention to carry \$5,500 insurance on the property and wished to arrange to carry that amount; "It has occurred in my mind that I never had any conversation about it, except at the time of soliciting the insurance he showed me two policies of \$1,000 each;" that he informed the company when he made the daily report of the risk of the amount of insurance on the property. A. C. Hull testified that he was special agent of the defendant, empowered to inspect risks, approve or reject them, in the south half of the state; that on June 27, 1891, he visited the store of Wright Bros. at Fairfield and inspected and approved their risk; that on that occasion one of said firm told him they were carrying \$2,000 other insurance besides the \$1,000 they were applying for that day; that \$3,000 was the total amount they asked for or wanted to carry on this stock; that there was nothing said about any additional insurance above \$3,000.

That a court of equity will relieve against a mutual mistake there can be no question; but it will not reform a policy of insurance or other contract on the ground of a mistake of fact, unless the proof is clear, convincing, and satisfactory, and free from reasonable controversy. The burden is upon the party alleging the mistake to establish it upon the trial. (*Blake Opera House Co. v. Home Ins. Co.*,

73 Wis., 667; *Cox v. Woods*, 67 Cal., 317; *National Fire Ins. Co. v. Crane*, 16 Md., 260; *Steinberg v. Phoenix Ins. Co.*, 49 Mo. App., 255; *Smith v. Allen*, 14 So. Rep. [Ala.], 760; *Northfield Farmers Township Mutual Fire Ins. Co. v. Sweet*, 46 Ill. App., 598; *Osmundson v. Thompson*, 57 N. W. Rep. [Ia.], 863; *Howland v. Blake*, 97 U. S., 624.) In the last case cited above Mr. Justice Hunt, in discussing the question of the reformation of written instruments upon the ground of mistake, observes: "In each case the burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed away by loose and inconclusive evidence."

A careful reading and consideration of the proofs on behalf of plaintiffs convinces us that it falls far short of establishing that a mistake was made in writing the policy in its not providing for subsequent concurrent insurance. It probably should have contained an indorsement of the \$2,000 prior insurance; but that it failed in this respect did not affect the rights of the insured, since the company, at the time this risk was written, had notice of the existence of such prior insurance. (*Home Fire Ins. Co. v. Hammang*, 44 Neb., 567.) It does not appear from Mr. Wright's testimony that there was any agreement or understanding between himself and defendant's agent, Mr. Hyde, that the policy should provide for \$5,500 concurrent insurance. The most that can be claimed for Mr. Wright's testimony is that he informed the company's agent of the intention of his firm to replenish the stock, and afterwards take out additional insurance, so as to make the total amount of insurance on the property about \$5,500. Not until the stock was increased by new purchases was it proposed to take out other policies. The

insured should have applied for and obtained an indorsement upon the policy in suit for additional insurance after the stock was replenished. The evidence of Wright, standing alone, falls far short of establishing a mutual mistake, such as would justify a court of equity in reforming the policy. This being true, it is unnecessary to discuss the evidence on behalf of the insurer.

It is undisputed that the company had no notice of the additional insurance. The statement of Mr. Wright to defendant's agent when the risk was solicited, that the former intended to take out additional insurance on the property, is not notice that the insured had procured such additional insurance. (*Eagle Fire Co. of New York v. Globe Loan & Trust Co.*, 44 Neb., 380.) The procuring of the subsequent insurance by the insured on the property without the knowledge of the defendant or its written consent therefor being indorsed on the policy is in violation of the clause therein forbidding additional insurance, and avoids the policy. (*German Ins. Co. v. Heiduk*, 30 Neb., 296; *Hughes v. Insurance Co. of North America*, 40 Neb., 626.) From this it follows that the district court erred in reforming the policy, and entering judgment thereon. The judgment will, therefore, be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

BAUM IRON COMPANY V. UNION SAVINGS BANK.

FILED JANUARY 19, 1897. No. 6944.

1. **Verdict: IMMATERIAL FINDINGS.** A verdict which is responsive to all the issues made by the pleadings will not be rejected because of immaterial findings.
2. ———: **JUDGMENT: VARIANCE.** When a verdict is sufficient to authorize a judgment, and there is no substantial variance between it and the judgment, the case will not be reversed for an informality in the verdict.

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3. **Replevin: CONVERSION: DAMAGES.** In replevin, where the property has been returned to the defendant for the failure of the plaintiff to give the statutory undertaking, and the action proceeds as one for conversion, the measure of his damages, in case the right of property and right of possession are found in his favor, is the market value of the property, with lawful interest thereon.

ERROR from the district court of Douglas county.
Tried below before BLAIR, J. *Affirmed.*

Kennedy & Learned, for plaintiff in error.

Frederick Shepherd, Hugh La Master, and McClanahan & Halligan, contra.

NORVAL, J.

A single question is presented for review, viz., whether the judgment is supported by the verdict of the jury.

The Union Savings Bank instituted an action of replevin against the Baum Iron Company to recover certain personal property, of which the petition alleged plaintiff was the owner and entitled to its immediate possession; that the value of the chattels was \$2,000; that defendant wrongfully detained them, to plaintiff's damage in the sum aforesaid. The prayer was for the return of the property, or its value if not returned, and for damages for the wrongful detention, and costs. The answer was a general denial. The property was taken under the writ, but the plaintiff having failed to give the undertaking required by statute, the chattels were returned by the officer to the defendant, and the action thereafter proceeded as one for damages only, under section 193 of the Code of Civil Procedure, which resulted in the following verdict being returned by the jury: ,

"We, the jury, duly impaneled and sworn to try the issues joined between the said parties, do find for the said plaintiff, that at the commencement of this action the plaintiff was, and now is, entitled to the possession of the following described articles, to-wit: 19 iron pulleys, 6 wooden pulleys, 40 feet of one and one-quarter inch shaft-

ing, 7 shaft hangers, 1 sand paper machine, 1 grindstone and fixtures, 1 rip saw and stand, 1 buzz jointer, 1 boring machine, 1 trusser, 1 power windlass, 1 heading lathe, 1 wheel stave jointer and 5 saws, of the value of \$715, and do assess his damage at the sum of \$1.

"We further find that at the commencement of this action the defendant was, and now is, entitled to the possession of the remainder of said goods mentioned in the writ of replevin in this case.

"PERRY C. HOUGH,

"Foreman."

A motion for a new trial was made by the defendant, which was overruled by the court and judgment entered upon the verdict in favor of the plaintiff for the sum of \$716, together with costs of suit.

It is argued that the verdict is wholly insufficient to authorize a judgment for plaintiff for more than \$1 and costs, in that it did not pass upon the question of ownership of the property, but the right of possession merely, and hence the value of the property was not recoverable. This position is untenable. If the premises were true, obviously the conclusion drawn therefrom by counsel would inevitably follow. But the jury found more than the right of possession of part of the property in plaintiff. They found generally for the bank, which responded to the issue made by the pleadings that it was the owner of the chattels; and had the verdict contained no specific finding upon the question of possession, plaintiff would have been entitled to recover the value of all the property, with legal interest. But the jury having determined that the plaintiff had the right of possession of a part of the property only, its recovery was limited to the value of such portion, and interest. The action proceeded to trial, not for the recovery of the property, but as for conversion, to recover its value; and it is conceded by counsel that no specific findings as to ownership and right of possession were necessary. The soundness of the proposition cannot be successfully assailed. The verdict would have

been good had it merely found generally for the plaintiff, and assessed the amount of its recovery. (*Philleo v. McDonald*, 27 Neb., 142.) Such is the effect of the verdict in this case when the immaterial finding as to the right of possession is eliminated and disregarded as surplusage. If such finding had been omitted, the verdict would nevertheless have been responsive to the issues to be tried; and a verdict will not be rejected because informal or containing immaterial findings. (*Degering v. Flick*, 14 Neb., 448; *State v. Beal*, 48 Neb., 817.) Counsel for defendant misconstrue the force and effect of the verdict returned when they say that it finds the right of possession alone in the plaintiff of a portion of the property, and is silent as to ownership. The first finding of the jury upon the issues joined is "for the said plaintiff." The right of property, as well as the right of possession, was involved, and both of these were determined in favor of the bank by the finding "for the said plaintiff," and it was limited only by the special findings as to right of possession. The decisions cited by defendant below do not sustain the contention of its counsel that the jury failed to pass upon the ownership of the property, since the verdict in each of such cases differed materially from the one under consideration. Thus, in *Holt v. Van Eps*, 46 N. W. Rep. [Dak.], 689, the verdict returned was: "We, the jury, find that the plaintiff is entitled to the possession of the property, and find its value to be \$650, and assess his damages to be \$75;" and in *Yick Kee v. Dunbar*, 26 Pac. Rep. [Ore.], 275, the verdict read; "We, the jury in the above entitled action, find that the plaintiff is entitled to the possession of the property described in the complaint, and assess the value thereof at \$3,000, and that plaintiff has been damaged by the detention thereof \$—." In neither of those cases was there a general finding for the plaintiff, but merely an adjudication upon the question of the right of possession to the property. The same is true of the other cases cited by defendant below. Manifestly a verdict like either of those above quoted would not be sufficient to

warrant a judgment for the value of the property, since such a recovery cannot be had upon a mere right of possession. *Phipps v. Taylor*, 16 Pac. Rep. [Ore.], 172, was replevin, and the verdict found the right of possession of a portion of the property in plaintiff and the remainder in the defendant, but was wholly silent as to the question of ownership; hence it is not an authority for holding that the verdict in this case is defective in substance. The same observations apply to *Child v. Child*, 13 Wis., 18, and *Appleton v. Barrett*, 22 Wis., 568, in neither of which did the verdict determine the title to the property. The case of *Smith v. Phelps*, 7 Wis., 211*, cited by defendant below in this action, was overruled by the same court in *Everit v. Walworth County Bank*, 13 Wis., 469, in so far as it decided that the verdict there under consideration was insufficient. In the *Everit* case, which was replevin, the verdict was sustained as sufficient in substance, which was in this language: "The jury find for the plaintiff; they find the value of the property in question to be \$600, and assess its damages at the sum of six cents." Strike out of the verdict before us the specific finding as to possession, and it is substantially like the one last above quoted. *Ela v. Bankes*, 37 Wis., 89, was an action to recover possession of certain crops, in which the jury found "for the defendant, and that he was entitled to the possession of the property," and also found its value and his damages for its detention. It was held that the verdict was a finding that the property belonged to the defendant and disposed of all the issues in the case. To the same effect are *Hall v. Jenness*, 6 Kan., 356; *Cain v. Cody*, 29 Pac. Rep. [Cal.], 778.

We are constrained to hold that the verdict in this case determined the right of property in favor of plaintiff below, and is responsive to every issue the jury were required to pass upon. The verdict, it is true, is somewhat irregular in the matter of the assessment of the amount of recovery, in that it does not specifically state the aggregate amount to which the jury

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deemed him entitled, but merely found the value of the property to be \$715, and assessed the amount of the damages at \$1. It is not for these reasons fatally defective. The amount of recovery was not left indefinite, but was easily ascertainable without going outside of the verdict, by adding together the value and damages specifically determined by the jury. The measure of plaintiff's recovery was the market value of the property, of which the title and right of possession were found to be in plaintiff below, with lawful interest thereon from the date of the unlawful taking to the first day of the term of court at which the trial was had. Interest was an element of damages, and the presumption must be indulged that the amount awarded therefor is represented by the \$1 assessed as damages.

It is argued that the valuation of the property at \$715 cannot be regarded as equivalent to an assessment of damages in that sum, and *Black v. Winterstein*, 6 Neb., 224, is cited to sustain the contention. That was replevin, the property being taken under the writ and possession delivered to plaintiff. The jury simply found the right of possession in the defendant and assessed the value of the property, but omitted to assess his damages, nevertheless the court rendered judgment for the defendant for the amount of the value returned by the jury, less \$55, the sum remitted by the defendant. In that case the ownership of the property was not found to be in the defendant, but the mere right of possession; hence it lacks analogy. LAKE, C. J., in the opinion, observed: "If the jury had found the right of property, as well as the right of possession, in the defendant, then the true measure of damages would have been its fair market value." The verdict herein supports the judgment, and the latter is accordingly

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
V. NEMAHA COUNTY.

FILED JANUARY 19, 1897. No. 6934.

1. **Taxation: COUNTIES: EXCESSIVE LEVY.** Under the constitution a county board has no authority to levy taxes which in the aggregate exceed \$1.50 per \$100 valuation, unless authorized so to do by the vote of the electors of the county, except for the payment of indebtedness existing at the date of the adoption of the constitution.
2. ———: ———: ———. When taxes levied by the county exceed the maximum rate fixed by the constitution, such portion of such taxes as is above the constitutional limit was levied for an "illegal and unauthorized purpose" within the meaning of section 144 of article 1, chapter 77, of the Compiled Statutes.
3. ———: ———: **RECOVERY OF TAXES PAID UNDER PROTEST.** Said section has provided two methods of recovering from a county illegal taxes paid under protest: First—Where the tax is claimed to be invalid for the reason that the property is not liable for taxation, or has been twice assessed in the same year and the taxes paid thereon, the party may, within thirty days after paying the same, file a verified claim with the county board setting forth the amount of taxes paid under protest, the grounds of such protest, and attach thereto the tax receipt, and he may appeal to the district court from any adverse decision. Second—If the tax paid under protest was imposed for any illegal or unauthorized purpose, or for any reason, other than double assessment or that the property was not subject to taxation, the tax is invalid, a suit at law may be maintained to recover the same.

ERROR from the district court of Nemaha county.
Tried below before BABCOCK, J. *Reversed.*

J. W. Deweese and J. S. Stull, for plaintiff in error.

A. J. Burnham, contra.

NORVAL, J.

This action was brought by the railroad company in the district court of Nemaha county to recover from the county \$213.12 for taxes paid under protest, and alleged to have been illegally and unlawfully levied in the year

1892 upon the property of the plaintiff. A demurrer to the petition was sustained by the court below, and the action dismissed, which ruling is assigned for error.

From the allegations of the petition it is disclosed that the county board of Nemaha county levied taxes in said county for the year 1892 for the following amounts: General fund, 9 mills; special road fund, 1 mill; county bridge, 4 mills; county road, 2 mills; county soldiers' relief fund, $\frac{1}{4}$ mill; total, $16\frac{1}{4}$ mills; that no vote of the people had been taken authorizing any such levies; that the assessed valuation of the property of the plaintiff in said county for said year was \$213,120, and the amount of taxes imposed in excess of the constitutional and statutory limit was \$213.12, which last mentioned sum plaintiff paid to the treasurer of Nemaha county on January 27, 1893, under written protest at the time duly made, and on the same day made a demand in writing upon said treasurer for the refunding to it of the amount of taxes thus paid, but that no part of the same has been refunded, and that on the 16th day of March, 1893, the county clerk of said county notified plaintiff that the county had decided, upon due consideration, not to refund the same.

The first question to be considered is whether the county board had any authority to levy a tax of $16\frac{1}{4}$ mills on the dollar valuation for county purposes. Section 5 of article 9 of the constitution of this state declares: "County authorities shall never assess taxes the aggregate of which shall exceed one and a half dollars per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people of the county." The foregoing provision is clear and unambiguous. The maximum rate of taxes which county boards can impose in any one year is by it fixed at "one and a half dollars per one hundred dollars valuation," unless a greater rate is authorized by a vote of the county, except for the payment of a valid indebtedness

existing when the constitution was adopted. This is a limitation upon the power of the legislature, and it cannot authorize a levy of taxes in excess of the maximum rate named in the constitution. (*In re House Roll* 284, 31 Neb., 505; *State v. Weir*, 33 Neb., 35; *Young v. Lane*, 43 Neb., 812.) No portion of this 16 $\frac{1}{4}$ -mill levy having been made to pay any indebtedness of the county which existed when the constitution was adopted, and it being specifically alleged that no vote of the electors of the county had ever been taken to authorize such levy, the taxes exceeding the constitutional limit levied and assessed upon plaintiff's property were illegal and void.

It is insisted that the court below had no original jurisdiction of the action, but that the remedy of plaintiff was to have presented its claim to the county board, and if the same was rejected, appeal from the decision to the district court. The determination of this question involves a consideration and construction of sections 144 and 145 of article 1, chapter 77, Compiled Statutes. Section 144, *inter alia*, provides: "In every case the person or persons claiming any tax, or any part thereof, to be for any reason invalid, who shall pay the same to the county treasurer, tax collector, or other proper authority, may proceed in the following manner, viz.: First—If such person claim the tax, or any part thereof, to be invalid for the reason that the property upon which it was levied was not liable to taxation, or that said property has been twice assessed in the same year and taxes paid thereon, he may pay such taxes under protest to the tax collector, county treasurer, or other proper authority, and it shall be the duty of the collector, treasurer, or other proper authority receiving such taxes, to give a receipt therefor, stating thereon that they were paid under protest, and the grounds of such protest, whether not taxable, or twice assessed, and taxes paid thereon. * * *

Within thirty days after paying such taxes, the person paying them shall file a statement in writing, duly verified, with the county board, setting forth the amount of

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taxes paid under protest, the grounds of said protest, and shall attach thereto the receipt taken for said taxes. Whereupon at the first meeting of the county board thereafter, they shall enquire into the matter, and if they shall find either that the property upon which such taxes were levied, was not liable to taxation, or that it had been twice assessed in the same year, and taxes paid thereon, they shall issue an order to the county treasurer to refund said taxes, stating therein what sum shall be refunded, and if they shall find that the grounds of such protest are not true, they shall issue an order to the county treasurer to dispose of said money in the same manner as though it had not been paid under protest. Appeals may be taken from such decisions in the same manner and within the times set forth in sections 37 and 38, chapter 18, of the Compiled Statutes of Nebraska; and if such an appeal be taken, the treasurer shall retain such taxes until the case is finally determined. Provided, That he shall in all cases retain said money until the time for an appeal shall have elapsed. * * *

Second—If such person claim the tax, or any part thereof, to be invalid for the reason that it was levied or assessed for an illegal or unauthorized purpose, or for any other reason, except as hereinbefore set forth, when he shall have paid the same to the treasurer, tax collector, or other proper authority, in all respects as though the same was legal and valid, he may, at any time, within thirty days after such payment, demand the same, in writing, from the treasurer of the state, of the county, city, village, township, district or other subdivision for the benefit, or under the authority, or by the request of which the same was levied, and if the same shall not be refunded within ninety days thereafter, may sue such county, city, village, township, district, or other subdivision, for the amount so demanded, and if upon the trial it shall be determined that such tax, or any part thereof, was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid, judgment shall be

rendered therefor, with interest, and the same shall be collected as in other cases."

It is very evident that the legislature has, by the foregoing section, provided two separate and distinct modes of procedure to obtain illegal taxes which have been paid under protest,—one by the presentation of a claim for such taxes, by the person paying the same, to the county board for audit and allowance, with the right of appeal from the decision provided for; and the other remedy being by suit at law to recover such taxes. But it will not escape notice that the method of procedure is determinable by the ground or grounds which render the taxes illegal. The first method provided in the section is limited to taxes imposed on property not subject to taxation, or to taxes rendered invalid by the reason of double assessment of the same property, while suit against the county, city, or other subdivision is authorized when the tax paid under protest was imposed for an illegal or unauthorized purpose, or for any reason other than for double assessment, or that the property was exempt from taxation, is invalid. The taxes in controversy in this case exceeded the maximum constitutional limit; therefore they were assessed for an illegal and unauthorized purpose within the meaning of said section 144, and the remedy by suit was the proper one to pursue.

In reaching this conclusion the provisions of section 145 of said chapter have not been lost sight of. They, it is true, authorized the treasurer, when a demand is made upon him to refund taxes paid, as provided in the second method of procedure indicated in section 144, to transmit a copy of such demand to the authorities whose duty it is to audit and pay claims against the state, county, city, etc., as the case may be, and they are required to pass upon the same as upon any other claim. This section, 145, was not enacted for the benefit of the taxpayer, but for the public, to afford the proper authorities an opportunity to pass upon and pay claims for taxes paid under

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protest, which were assessed for an illegal and unauthorized purpose, and thereby prevent needless litigation. Said section does not require the person paying a tax under protest to file a claim therefor with any board, for audit and allowance, nor does the record before us show that plaintiff has done so in the case at bar. The only averment in the petition on the subject is that the county clerk notified the company that the county had decided not to refund the taxes, but this does not justify the inference that the plaintiff presented its claim to the county board for allowance, since by section 145 it was made the duty of the county treasurer to transmit to such board a copy of the demand to refund the taxes, for allowance or rejection, which was probably done in this case. No provision is made for appeal from such action. Whether plaintiff might have presented its claim to the county board for allowance as a general creditor of the county, and after an adverse decision, appealed to the district court, it is unnecessary to decide, as the question does not arise in this case. Under the statute it had the right to recover the taxes by suit. The court below erred in sustaining the demurrer to the petition, and the judgment is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

EDWARD RENARD, APPELLEE, V. IRA THOMAS ET AL.,
APPELLANTS.

FILED JANUARY 19, 1897. No. 6961.

Appeal: LACHES: DISMISSAL. An appeal to the supreme court not taken within six months from the date of the rendition of the decree or final order sought to be reviewed will be dismissed.

APPEAL from the district court of Burt county. Heard below before FERGUSON, J. *Appeal dismissed.*

Ira Thomas, for appellants.

H. H. Bowes, contra.

NORVAL, J.

This is an appeal from a decree rendered in the court below on the 17th day of November, 1893, foreclosing a tax lien. The transcript was filed in this court, and the appeal docketed, on May 18, 1894, which was more than six months after the rendition of the decree; hence this court has no jurisdiction of the cause. (*Verges v. Roush*, 1 Neb., 113; *Glore v. Hare*, 4 Neb., 131; *Schuyler v. Hanna*, 28 Neb., 601; *Fitzgerald v. Brandt*, 36 Neb., 683; *Withnell v. City of Omaha*, 37 Neb., 621; *Omaha Loan & Trust Co. v. Ayer*, 38 Neb., 891.) The appeal is accordingly

DISMISSED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
V. STATE OF NEBRASKA, EX REL. STATE BOARD OF
TRANSPORTATION.

FILED JANUARY 19, 1897. No. 6795.

Railroad Companies: RIGHT OF WAY: ELEVATORS: BOARD OF TRANSPORTATION: CONSTITUTIONAL LAW. An order of the state board of transportation under the provisions of the act of March 31, 1887, entitled "An act to regulate railroads and prevent unjust discrimination," etc., which requires a railroad company to surrender a portion of its right of way for an elevator site to a person or corporation engaged in the buying and shipping of grain, contemplates the taking of property for mere private use within the prohibition of the United States constitution, and is accordingly without authority and void. (*Missouri P. R. Co. v. State*, 17 Sup. Ct. Rep., 130, reversing same case, 29 Neb., 550.)

ERROR from the district court of Custer county. Tried below before HARRISON, J. *Reversed.*

J. W. Deweese and J. S. Kirkpatrick, for plaintiff in error.

Sullivan & Gutterson and J. R. Dean, contra.

NORVAL, J.

On the 9th day of February, 1893, the state board of transportation, on the complaint of one Byram Blair, made and entered of record an order requiring the plaintiff in error, hereafter called the railroad company, to furnish him, the said Blair, the site for the erection of a grain elevator upon its right of way and sidetracks in the city of Broken Bow. On the 5th day of July, 1893, said board instituted this proceeding in the district court of Custer county for the purpose of enforcing the order aforesaid by means of a writ of *mandamus* against the respondent railroad company. A trial was had in the district court upon issues joined, which resulted in a finding and judgment in accordance with the prayer of the relator, and which has, by means of the petition in error of the railroad company, been removed into this court for review.

Several questions are presented by the record, although the one necessarily decisive of the controversy is whether railroad companies doing business as common carriers within this state are, by virtue of the act of March 13, 1887, entitled "An act to regulate railroads and prevent unjust discrimination," etc. (Session Laws, 1887, p. 541, ch. 60), required to furnish elevator sites upon their rights of way for persons and corporations engaged in the business of buying and shipping grain. That question was in *State v. Missouri P. R. Co.*, 29 Neb., 550, after a careful consideration of the subject, resolved in the affirmative. But a petition in error prosecuted by the respondent therein to the supreme court of the United States resulted in the reversal of the judgment of this court. (See *Missouri P. R. Co. v. State*, 17 Sup. Ct. Rep., 130.) The court, in the decision last cited, speaking by Mr. Justice Gray, declared that the order of the board of transportation, similar in effect to the one here relied upon, contemplated the taking of the property of the respondent without its consent, for a mere private use, and

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was accordingly violative of article 14, amendment to the constitution of the United States. To that decision of the court of last resort in all cases of alleged repugnance of the laws of any state to the constitution of the United States, it is our duty to yield obedience. It follows that the judgment complained of, which is based upon the decision of this court in the case above cited, must be reversed and the cause dismissed.

REVERSED.

HARRISON, J., not sitting.

THOMAS FICKES, APPELLEE, V. VICK BROTHERS ET AL.,
APPELLANTS.

FILED JANUARY 19, 1897. No. 7013.

Judgment: INJUNCTION. In an action to enjoin the enforcement of a judgment, relief should not be granted because of the service of an unauthorized summons upon which such judgment was rendered, in the absence of a showing of the existence of a defense to the cause of action which formed the basis of the judgment assailed.

APPEAL from the district court of Saunders county.
Heard below before WHEELER, J. *Reversed.*

Stevens & Cochran, for appellants.

E. H. Wooley, *contra*.

RYAN, C.

This action was brought in the district court of Saunders county by Thomas Fickes to enjoin the collection of a judgment rendered against him by a justice of the peace of Lancaster county. It was alleged in the petition of Mr. Fickes that at the time that said judgment was rendered he was a resident of Cass county, and that by

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reason of a collusive entry of appearance by a co-defendant, also a resident of Cass county, the aforesaid justice of the peace assumed to have jurisdiction, upon a summons afterwards served in Cass county, to render judgment against Fickes. There was a decree as prayed, and to reverse such decree this appeal is prosecuted.

There was a radical defect in the petition of Mr. Fickes as to the existence of a defense to the cause of action upon which judgment had been rendered by the justice of the peace in Lancaster county. There were in the petition the following averments: "That said judgment was so fraudulently obtained as aforesaid because this plaintiff had a good and valid defense against said note, which fact the Vick Bros. well knew and so fraudulently obtained said judgment to prevent this plaintiff from making said defense." There was no reference to a defense other than was contained in the language just quoted. In *Hughes v. Housel*, 33 Neb., 703, it was held that when a party seeks to set aside a judgment against him which is regular on its face, on the ground that he has a meritorious defense, he must plead the facts constituting such alleged defense. The same rule was enforced in *Lander v. Abrahamson*, 34 Neb., 553, and in *Winters v. Means*, 25 Neb., 241. In *Janes v. Howell*, 37 Neb., 320, it was held that even where the return of service of summons was shown to be false, there must, to entitle to relief, be averments and proof of the existence of a meritorious defense. In the case under consideration there was no defense alleged or found by the court in its special findings of fact, neither was there any evidence to justify such a finding had it been made. The judgment is therefore reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

T. A. SHAW & COMPANY V. ROBINSON & STOKES COMPANY ET AL.

FILED JANUARY 19, 1897. No. 6997.

1. **Corporations: INSOLVENCY: PREFERRING CREDITORS.** There is no inflexible rule in existence which, under all conditions, prevents an insolvent corporation from transferring or encumbering its property in good faith and for proper purposes.
2. ———: ———: ———. Whether or not an insolvent corporation has made a disposition of its property in fraud of the rights of its creditors cannot be determined as a question of law, but, as a question of fact, must be determined upon consideration of the evidence in each particular case.

ERROR from the district court of Douglas county.
Tried below before FERGUSON, J. *Affirmed.*

The facts are stated by the commissioner.

Duffie & Van Dusen, for plaintiff in error:

The assignments made and the attachment suits commenced by the assignees and levied upon the property of the company, followed by placing the company in the hands of a receiver upon its own application, constituted a general assignment for the benefit of the creditors. It was one transaction in the eyes of the law, and the company having attempted to prefer certain creditors, the assignment is void. (*Burrows v. Lehdorff*, 8 Ia., 96; *Van Patten v. Burr*, 52 Ia., 518; *Perry v. Holden*, 22 Pick. [Mass.], 269; *Kellogg v. Root*, 23 Fed. Rep., 525; *Berry v. Cutts*, 42 Me., 445; *Doggett v. Herman*, 5 McCrary [U. S.], 269.)

The directors of an insolvent corporation are trustees for the creditors. (*Bliss v. Matteson*, 45 N. Y., 22; *Butts v. Wood*, 37 N. Y., 317; *Robinson v. Smith*, 3 Paige Ch. [N. Y.], 222; *Aberdeen R. Co. v. Blaike*, 1 McQueen [Scotch], 461; *Horbach v. Marsh*, 37 Neb., 22; *Bradley v. Farwell*, 1 Holmes [U. S.], 433.)

The directors of an insolvent corporation cannot give

preference to one of its creditors over another. (*Wood v. Dummer*, 3 Mason [U. S.], 308; *Rouse v. Merchants Nat. Bank*, 46 O. St., 493; *Beach v. Miller*, 130 Ill., 162; *Drury v. Cross*, 7 Wall. [U. S.], 299; *Curran v. State*, 15 How. [U. S.], 307; *Richards v. New Hampshire Ins. Co.*, 43 N. H., 263; *Haywood v. Lincoln Lumber Co.*, 64 Wis., 639; *Port v. Russell*, 36 Ind., 60; *Lippincott v. Shaw Carriage Co.*, 21 Fed. Rep., 577; *Martin v. Zellerbach*, 38 Cal., 300; *Holder v. Lafayette, B. & M. R. Co.*, 71 Ill., 106; *Pyles v. Riverside Furniture Co.*, 30 W. Va., 134; *Lamb v. Laughlin*, 25 W. Va., 300; *Burr v. McDonald*, 3 Gratt. [Va.], 206; *Briggs v. Penniman*, 8 Cow. [N. Y.], 390; *Carey v. Cincinnati & C. R. Co.*, 5 Ia., 357; *Philips v. Whickham*, 1 Paige Ch. [N. Y.], 595; *Bank of Poughkeepsie v. Ibbotsen*, 24 Wend. [N. Y.], 478; *Moore v. Whitcomb*, 48 Mo., 543; *State Savings Ass'n v. Kellogg*, 52 Mo., 588.)

The fact that the company is an Iowa corporation gives it no additional right to prefer creditors. (*Guillander v. Howell*, 35 N. Y., 657; *Delahaye v. Heitkemper*, 16 Neb., 475; *Ford v. Plankinton Bank*, 58 N. W. Rep. [Wis.], 766; *Conover v. Hull*, 10 Wash., 673; *Orr v. Thompson*, 35 S. W. Rep. [Tex.], 473; *Lyons v. Perry*, 27 S. W. Rep. [Tex.], 100.)

References as to rights which plaintiff in error acquired by garnishment: *Brooks v. Greathead*, 1 J. & W. [Eng.], 176; *Angel v. Smith*, 9 Ves. [Eng.], 335; *Vermont & C. R. Co. v. Vermont Central R. Co.*, 46 Vt., 798; *Riggs v. Whitney*, 15 Abb. Pr. [N. Y.], 390; *In re Day*, 34 Wis., 643; *Brown v. Rauch*, 1 Wash., 497; *Moore v. Mercer Wire Co.*, 15 Atl. Rep. [N. J.], 737; *Reed v. Richmond & A. R. Co.*, 4 S. E. Rep. [Va.], 587; *Lyman v. Central V. R. Co.*, 10 Atl. Rep. [Vt.], 346; *Jones v. Browse*, 9 S. E. Rep. [W. Va.], 873; *Melendy v. Barbour*, 78 Va., 544; *Conwell v. Lowrance*, 26 Pac. Rep. [Kan.], 462; *Webster v. Lawrence*, 47 Hun [N. Y.], 565; *Adams v. Woods*, 8 Cal., 153, 9 Cal., 24; *Meara v. Holbrook*, 20 O. St., 143; *Hawkins v. Gathercole*, 1 Drew. [Eng.], 17; *Randfield v. Randfield*, 4 Drew. [Eng.], 314; *Adams v. Hackett*, 7 Cal., 187.

Winfield S. Strawn, appearing by permission of the court and courtesy of counsel in the case, argued the following propositions:

An insolvent corporation cannot prefer a creditor or creditors. Such a preference by an insolvent corporation is a use of its property for a purpose other than "to accomplish the legitimate object of its creation." (Compiled Statutes, ch. 16, sec. 55, ch. 15, sec. 1; *Graham v. La Crosse & M. R. Co.*, 102 U. S., 148; *Head v. Providence Ins. Co.*, 2 Cranch [U. S.], 169; *Lyons v. Perry Stove Co.*, 86 Tex., 143; *Orr v. Thompson*, 35 S. W. Rep. [Tex.], 473; *Thomas v. West Jersey R. Co.*, 101 U. S., 81; *Richie v. Ashbury Iron Co.*, L. R., 7 H. L. [Eng.], 633; *Sutton Mfg. Co. v. Hutchinson*, 63 Fed. Rep., 496.)

The property, when the corporation is actually insolvent, is a trust fund to which all creditors have a right to resort for the payment of the claims ratably. (*State v. Commercial State Bank*, 28 Neb., 677; *Ingwersen v. Edgecombe*, 42 Neb., 744; *Sutton Mfg. Co. v. Hutchinson*, 63 Fed. Rep., 496; *Bosworth v. Jacksonville Nat. Bank*, 64 Fed. Rep., 621; *Tillson v. Downing*, 45 Neb., 549; *Upton v. Tribilcock*, 91 U. S., 47; *Conover v. Hull*, 10 Wash., 673; *Ford v. Plankinton Bank*, 87 Wis., 363; *Ballin v. Merchants Exchange Bank*, 61 N. W. Rep. [Wis.], 1118.)

It is not the policy of the law to extend the privileges of corporate bodies beyond the express powers granted them by the legislature.

Abbott, Selleck & Lane, amici curiæ:

An insolvent corporation that has ceased to be a going concern has no power, in the distribution of its assets, to prefer one or more of its creditors to the exclusion of others. The relation of the directors toward the property and assets of the insolvent corporation is that of trustees for all the creditors. (*Adams v. Deyette*, 59 N. W. Rep. [S. Dak.], 215; *Atwater v. American Exchange Bank*, 38 N. E. Rep. [Ill.], 1019; *Marr v. Bank of West Tennessee*, 4 Cold.

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[Tenn.], 471; *Swyer v. Hoag*, 17 Wall. [U. S.], 620; *Sanger v. Upton*, 91 U. S., 60; *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis., 63; *Messersmith v. Sharon Savings Bank*, 96 Pa. St., 443; *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep., 7; *Turnbull v. Prentiss Lumber Co.*, 21 N. W. Rep. [Mich.], 379; *Hastings v. Drew*, 76 N. Y., 9; *Tompson v. Huron Lumber Co.*, 30 Pac. Rep. [Wash.], 741; *Holbrook v. Peters*, 8 Wash., 344; *Harrigan v. Quay*, 26 S. W. Rep. [Tex.], 512.)

Montgomery & Hall, for defendants in error:

A private corporation, in failing circumstances, may prefer certain creditors. (*La Grange Butter-Tub Co. v. Nat. Bank of Commerce*, 26 S. W. Rep. [Mo.], 710; *Roseboom v. Whittaker*, 132 Ill., 81; *Moon Bros. v. Waxahachie Grain & Improvement Co.*, 35 S. W. Rep. [Tex.], 337; *Ballin v. Merchants Exchange Bank*, 61 N. W. Rep. [Wis.], 1118; *Buchanan v. Barnes*, 34 S. W. Rep. [Tenn.], 425; *Buell v. Buckingham*, 16 Ia., 284; *Hallam v. Indianola Hotel Co.*, 56 Ia., 178; *Garrett v. Burlington Plow Co.*, 70 Ia., 697; *Warfield v. Marshall County Canning Co.*, 72 Ia., 666; *Rollins v. Shaver Wagon & Carriage Co.*, 80 Ia., 380; *Gould v. Little Rock, M. R. & T. R. Co.*, 52 Fed. Rep., 680; *Allis v. Jones*, 45 Fed. Rep., 148; *Britton v. Boyer*, 27 Neb., 522; *Davis v. Scott*, 27 Neb., 642; *Brown v. Furniture Co.*, 58 Fed. Rep., 286; *Fogg v. Blair*, 133 U. S., 534; *Smith v. McGroarty*, 136 U. S., 237; *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S., 371; *Livinger v. Raymond*, 12 Neb., 19; *Deitrich v. Hutchinson*, 20 Neb., 52; *Duncomb v. New York H. & N. R. Co.*, 84 N. Y., 190; *Coats v. Donnell*, 94 N. Y., 168; *Dabney v. Bank of South Carolina*, 3 S. Car., 156; *Stratton v. Allen*, 16 N. J. Eq., 229; *Wilkinson v. Bauerle*, 41 N. J. Eq., 635; *Covert v. Rogers*, 38 Mich., 363; *Bank of Montreal v. Potts*, 51 N. W. Rep. [Mich.], 512; *State v. Bank of Maryland*, 6 Gill & J. [Md.], 205; *Catlin v. Eagle Bank*, 6 Conn., 233; *Smith v. Skeary*, 47 Conn., 47; *Foster v. Mullanphy Planing Mill Co.*, 92 Mo., 79; *Alberger v. National Bank of Commerce*, 27 S. W. Rep. [Mo.], 657; *Meyer v. American Chair Co.*, 32 S. W. Rep.

[Mo.], 300; *Dana v. United States Bank*, 5 W. & S. [Pa.], 245; *Ashhurst's Appeal*, 60 Pa. St., 314; *Ringo v. Bisco*, 13 Ark., 563; *Worthen v. Griffith*, 28 S. W. Rep. [Ark.], 286; *Planter's Bank v. Whittle*, 78 Va., 737; *Warner v. Mower*, 11 Vt., 390; *Arthur v. Commercial & B. Bank*, 17 Miss., 430; *Palmer v. Hutchinson*, 11 So. Rep. [Miss.], 789; *O'Bear Jewelry Co. v. Volfer*, 17 So. Rep. [Ala.], 525; *Hospes v. Northwestern Mfg. Co.*, 50 N. W. Rep. [Minn.], 1117; *Reichwald v. Hotel Co.*, 106 Ill., 439; *Illinois Steel Co. v. O'Donnell*, 41 N. E. Rep. [Ill.], 185; *Blair v. Illinois Steel Co.*, 42 N. E. Rep. [Ill.], 895.)

Charles B. Keller, also for defendants in error:

A receiver cannot be garnished. (*Field v. Jones*, 11 Ga., 413; *Columbia Book Co. v. De Golyer*, 115 Mass., 67; *Richards v. People*, 81 Ill., 551; *Taylor v. Gillelan*, 23 Tex., 508; *Blake Crusher Co. v. Town of New Haven*, 46 Conn., 472; *Atlas Bank v. Nahant Bank*, 23 Pick. [Mass.], 480; *Hubbard v. Hamilton Bank*, 7 Met. [Mass.], 346; *McGowan v. Myers*, 66 Ia., 103; *Noe v. Gibson*, 7 Paige Ch. [N. Y.], 513; *Hills v. Parker*, 111 Mass., 508; *Northfield Knife Co. v. Sharpleigh*, 24 Neb., 635; *Rogers v. Corning*, 44 Barb. [N. Y.], 229.)

The overwhelming array of decisions supports the right of an insolvent corporation to prefer one or more creditors to the exclusion of others. (*Pondville Co. v. Clark*, 25 Conn., 97; *New Haven Savings Bank v. Bates*, 8 Conn., 505; *Hopson v. Aetna Axle & S. Co.*, 50 Conn., 597; *Southern White Lead Co. v. Haas*, 73 Ia., 404; *Warren v. First Nat. Bank*, 149 Ill., 10; *Ragland v. McFall*, 27 N. E. Rep. [Ill.], 75; *Glover v. Lee*, 140 Ill., 102; *Peterson v. Brabrook Tailoring Co.*, 37 N. E. Rep. [Ill.], 42; *Brabrook v. Belden Bros.*, 40 Ill. App., 326; *Warren v. First Nat. Bank*, 38 N. E. Rep. [Ill.], 122; *Beach v. Miller*, 22 N. E. Rep. [Ill.], 464; *Mullanphy Bank v. Schott*, 26 N. E. Rep. [Ill.], 640; *Atwater v. American Exchange Bank*, 38 N. E. Rep. [Ill.], 1017; *Paulding v. Chrome Steel Co.*, 94 N. Y., 334; *Varnon v. Hart*, 119 N. Y., 101; *Town v. Bank of River Raisin*, 2 Doug. [Mich.], 530; *Vail v. Jameson*, 7 Atl. Rep. [N. J.], 520; *Bergen v.*

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Porpoise Fishing Co., 8 Atl. Rep. [N. J.], 23; *Burr v. McDonald*, 3 Grat. [Va.], 216; *Pyles v. Riverside Furniture Co.*, 2 S. E. Rep. [W. Va.], 909; *Hulings v. Hulings Lumber Co.*, 18 S. E. Rep. [W. Va.], 620; *Union Bank v. Ellicott*, 6 Gill & J. [Md.], 363; *Ex parte Conway*, 4 Ark., 303; *Whitwell v. Wareur*, 20 Vt., 425; *Sargent v. Webster*, 13 Met. [Mass.], 497; *Pond v. Framingham & T. R. Co.*, 130 Mass., 194; *Hospes v. Northwestern Mfg. Co.*, 48 Minn., 174; *Weihl v. Atlanta Furniture Co.*, 15 S. E. Rep. [Ga.], 282; *Ardesco Oil Co. v. North American Oil & Mfg. Co.*, 66 Pa. St., 375; *United States v. Bank of United States*, 8 Rob. [La.], 262; *Bank of United States v. Huth*, 4 B. Mon. [Ky.], 429; *Gibson v. Goldthwait*, 7 Ala., 281; *Corey v. Wadsworth*, 11 So. Rep. [Ala.], 350; *Goodyear Rubber Co. v. Scott*, 11 So. Rep. [Ala.], 370; *Globe Iron Roofing Co. v. Thatcher*, 6 So. Rep. [Ala.], 367; *Henderson v. Indiana Trust Co.*, 40 N. E. Rep. [Ind.], 516; *DeCamp v. Alward*, 52 Ind., 468; *Schufeldt v. Smith*, 31 S. W. Rep. [Mo.], 1039; *City of St. Louis v. Alexander*, 23 Mo., 524; *Kitchen v. St. Louis, K. C. & N. R. Co.*, 69 Mo., 259; *Roan v. Winn*, 93 Mo., 503; *Williams v. Jones*, 23 Mo. App., 132; *Slavens v. Cook Drug Co.*, 30 S. W. Rep. [Mo.], 1025; *Hills v. Stockwell & D. Furniture Co.*, 23 Fed. Rep., 432; *Lippencott v. Shaw Carriage Co.*, 25 Fed. Rep., 577; *Milroy v. Eage*, 30 Fed. Rep., 544; *White v. Pettes*, 30 Fed. Rep., 864; *Sanford Fork Co. v. Howe, Brown & Co.*, 157 U. S., 312; *Graham v. La Crosse & M. R. Co.*, 102 U. S., 148; *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S., 587; *Hawkins v. Glenn*, 131 U. S., 319.)

Mahoney, Minahan & Smyth, also for defendants in error.

W. W. Morsman, Harwood, Ames & Pettis, Capps & Stevens, John A. Casto, and *J. B. Cessna*, filed printed arguments in favor of the points urged on behalf of defendants in error.

RYAN, C.

In the district court of Douglas county the Robinson & Stokes Company, a corporation, petitioned for and ob-

tained a receiver. In the petition, which was filed on the 16th day of November, 1892, it was alleged that the defendants, the Commercial National Bank, Anastatia Burnette, and the National Bank of Commerce had each procured to be levied attachments upon the wares and merchandise of the plaintiff, and that, to prevent irreparable loss by reason of certain facts pleaded, it was necessary that the plaintiff's factory, wherein its goods and wares were situated, should be kept in operation. The receiver was appointed, as prayed, to operate said factory and collect outstanding debts due the plaintiff. From the proceeds of the sales of merchandise it seems that the claims of the defendants above named were fully paid. The Commercial National Bank, one of these defendants, had in its possession book accounts and bills receivable of the plaintiff as collateral security to its claim, and it is in respect to the proper distribution of the proceeds of these that this controversy exists between the intervenors, May Bros. on one hand and T. A. Shaw & Co. on the other. By its petition of intervention the firm of May Bros. founded its claim upon the following written agreement:

"OMAHA, November 15, 1892.

"Whereas, we are indebted to May Bros., of Fremont, Nebraska, in the sum of \$5,000; and whereas, we have assigned all our book accounts and bills receivable to the Commercial National Bank of Omaha, Nebraska, as collateral security for our indebtedness to said bank (excepting thirteen hundred dollars assigned to First National Bank, Marshalltown, Iowa); and whereas, we have also assigned said book accounts and bills receivable as aforesaid to Mrs. Anastatia Burnette as collateral security to secure the sum of about \$11,500, subject to that of the bank as aforesaid; and whereas, we have further assigned said book accounts and bills receivable as aforesaid to the National Bank of Commerce to secure the sum of about \$6,000, subject to the aforesaid assignments: Now, therefore, we hereby assign all our right, title, and

interest in and to said book accounts and bills receivable to said May Bros., of Fremont, Nebraska, as collateral security for said indebtedness of \$5,000, subject, however, to the rights of each and all of the aforesaid assignees, as hereinbefore specified."

The right of the firm of T. A. Shaw & Co. to the amount in controversy was, in its petition of intervention, predicated upon averments that on November 18, 1892, said firm had brought its action in the district court of Douglas county against the Robinson & Stokes Company, and had on the same day caused to be garnished the Commercial National Bank. On motion of May Bros. the amount in controversy was ordered paid to May Bros., and it is for a review of this order that T. A. Shaw & Co. have prosecuted error proceedings to this court.

It appears from the evidence that after nightfall of November 15, 1892, there were present in the law office of Montgomery, Charlton & Hall the president, the secretary, and the attorney of the Robinson & Stokes Company and certain attorneys representing the defendants named in the petition for a receiver, and that there was at said time and place adopted by the Robinson & Stokes Company this resolution: "Whereas this company is indebted to the Com. Nat. Bank, of Omaha, Nebraska, in the sum of \$40,000; and whereas said bank is demanding security for the payment of said indebtedness, now therefore, be it resolved that the Pres. and Secy. of this Co., on behalf of the Co., be authorized to assign to May Bros., Fremont, Neb., all their notes, bills receivable, accounts, books of accounts, demands and claims of every kind and name owing to and belonging to this Co., subject to prior assignments as collateral for the payment of the indebtedness of this Co. to said May Bros. evidenced by a certain promissory note calling for \$5,000 in favor J. T. Robinson, R. E. Sears, T. H. Burnette, G. E. Stokes." The parties who are named after the words "in favor" seem to have been concerned in the Robinson & Stokes Company as officers and stockholders. On September 7,

1893, there were the following proceedings, as shown by the journal entry in this case: "The above cause coming on this day to be heard upon the exceptions of May Bros., intervenors, to the report of the receiver and the exceptions of Theodore A. Shaw and others to the report of the receiver, and the exceptions of the Robinson & Stokes Company to the report of the receiver, and, after hearing the evidence and the argument of counsel, and the court being fully advised in the premises overrules the exceptions of Theodore A. Shaw and others to the report of the receiver so far as the same pertains or relates to the power of a corporation to prefer a creditor and to prefer the parties which the said Robinson & Stokes Company did prefer in this case, to which the said Theodore A. Shaw and others except." Conformably with the above ruling the receiver was directed to pay to May Bros. the amount in dispute. In the petition in error there is assigned the overruling of the exceptions above noted, but we have been unable to find in the record any exception of the nature indicated. Indeed, the report of the receiver very properly dealt only with what he had done, and how much he held in his hands subject to the order of the court. The record therefore must be assumed to have described the contention of counsel for Shaw & Co. as exceptions of the nature indicated, and the question to be determined is thus limited to the power of an insolvent corporation, under any circumstances, to prefer one of its creditors. It would be useless to attempt a review of all the cases cited on this proposition, and we shall therefore take up the contentions of plaintiff in error in the order in which they are presented by its brief and with reference to each express our views in a general way.

It is first contended that the transfer of November 15 by the Robinson & Stokes Company amounted in law to a general assignment for the benefit of creditors. This question is not presented by the order assailed by the petition in error, for this is not an appeal from a decree

which presents all questions for trial *de novo*, but is a proceeding in error to review an order affecting a substantial right, made in a special proceeding determined upon an exception limited to a certain matter which was the abstract right of an insolvent corporation to prefer certain creditors.

It is next urged that the directors of an insolvent corporation are trustees for its creditors; that is to say, upon the insolvency of a corporation, its directors become mere trustees to hold its property for the benefit of its creditors, for, as it is argued, a corporation's insolvency is, civilly, its death. If the proposition that at the instant a corporation becomes insolvent it is dead is conceded, there would be no question that it could not afterwards transact business of any kind, and plaintiff in error would be entitled to the relief he prays, unless, perchance, this principle is too far-reaching in its consequences. Let us suppose that the Robinson & Stokes Company was civilly dead on the 15th of November, 1892, and that the transfer of its assets which precluded the transaction of business by it was conclusive evidence that as a corporation it had no further existence, and what inevitably follows? In the first place it could not have commenced and maintained this action for the appointment of a receiver and the winding up of its business affairs, for a dead person cannot be plaintiff in an action or civil proceeding. In the next place the firm of T. A. Shaw & Co. would have no standing in this case, for their attachment action was begun on November 16 and was prosecuted, according to their own argument, against a dead person. Other general considerations point to the same result, one of which is that a corporation may, in an insolvent condition, do business for years and, if the contention of the plaintiff in error is correct, its transactions during this time be found finally to be absolutely void. We are now speaking of the status of an insolvent corporation unaffected by statutory provisions. Later we shall consider an argument based on a statutory enactment. The

functions of such a corporation may be suspended, and such a suspension must inevitably accompany its death; but from these predicates it does not necessarily result that a suspension of functions always implies death. As to the proposition that the directors of an insolvent corporation hold its property in trust for its creditors the same observation applies, for, in a certain sense, this is true, and yet it by no means follows that the law impresses this property with such a trust as may be enforced only in a court of equity. If the funds of an insolvent corporation are purely trust funds in the hands of its directors as trustees, it would follow that, in any action of creditors of such corporation to subject said funds to the payment of their claims, the trustees should be made defendants. Among all the cases cited we have observed none in which the creditor of an insolvent corporation has proceeded against its directors on the assumption that it should be required that they should execute a trust with respect to property of the corporation in their possession. On general principles this would seem very significant. Plaintiff in error, however, argues that insolvency operates the dissolution of a corporation, and, therefore, that the provisions of sections 62 *et seq.*, chapter 16, Compiled Statutes, countenance the trust fund theory and authorize the very proceedings, which, as we have just remarked, we have never found to have been resorted to. Section 62, above referred to, provides: "Upon the dissolution, by the expiration of the terms of its charter or otherwise, of any corporation now existing or hereafter created, and unless other persons be appointed by the legislature or by some court of competent authority, the directors or managers of the affairs of such corporation acting last before the time of its dissolution, by whatever name they may be known in law, and the survivors of them, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the same, collect and pay outstanding debts and divide

among the stockholders the moneys and property that shall remain, in proportion to the stock of each stockholder paid up, after the payment of debts and necessary expenses," etc. By sections 63, 64, 67, and 68 of chapter 16, Compiled Statutes, provisions are made for prosecuting or enforcing pending or necessary suits in the name of the dissolved corporation where found necessary. It is provided by section 65 of said chapter 16: "The title of all real estate belonging to any such corporation shall, at the time of the dissolution of the same, pass to the trustees of such corporation, who shall have full power and authority to sell and dispose of any such real estate, in such manner and upon such terms as may be thought best for the interest of the creditors and stockholders, and, upon any such sale to make a good and sufficient title therefor." If, as contended by the plaintiff in error, an insolvent corporation is to be deemed a dissolved corporation, it would follow under the provisions of the section just quoted that the directors of such insolvent corporation are expressly authorized to sell and dispose of its real property for the interests of not only its creditors but of its stockholders as well. It is not usually necessary to provide with reference to stockholders when a corporation becomes insolvent, for in that event the creditors are generally compelled to appropriate all its assets. The contentions of plaintiff in error then are: First, that on general principles the entire assets of an insolvent corporation constitute a trust fund and cannot be disposed of for the payment of its debts; and, second, under the above statutory provisions that if its assets are real property they may be sold by the directors and the proceeds of such sale be paid over by such directors, as shall be thought best for the interests of the creditors and the stockholders. It seems to us that these are inconsistent propositions and that it is very unreasonable to suppose an insolvent corporation cannot transfer its personal property but that the directors, as trustees, may sell and dispose of its real property. We

are of the opinion that the dissolution contemplated in the above statute is the voluntary dissolution provided for by the two-thirds vote of the members of the corporation under section 134, chapter 16, Compiled Statutes, or the expiration of limitation of charter, the loss of membership, the surrender of its franchise as a corporation, or forfeiture by non-user or misuser described in 2 Morawetz, Private Corporations, p. 1005, 2 Beach, Private Corporations, secs. 780, 782. The full purport of what is expressed or implied by the statement that the assets of an insolvent corporation are a trust fund for the benefit of its creditors is expressed in the following cases:

In *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S., 371, 14 Sup. Ct. Rep., 127, Mr. Justice Brewer said: "The expression often used that the property of a corporation constitutes a 'trust fund,' for its creditors, only means that when the corporation is insolvent and the court of equity has possession of its assets for administration, such assets must be appropriated to the payment of its debts before any distribution to the stockholders, but as between the corporation itself and its debtors, the former does not hold its property in trust, or subject to a lien in favor of its creditors in any other sense than does an individual debtor."

In *Fogg v. Blair*, 133 U. S., 534, Field, J., said: "We do not question the general doctrine invoked by the appellant that the property of a railroad company is a trust fund for the payment of its debts, but do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders; it does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to *bona fide* purchasers for a valuable consideration except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence."

In *Hospes v. Northwestern Mfg. & Car Co.*, 50 N. W. Rep. [Minn.], 1117, it is said by Mitchell, J., speaking for the whole court: "This trust fund doctrine, commonly called the 'American doctrine,' has given rise to much confusion of ideas as to its real meaning and much conflict of decision in its application. To such an extent has this been the case that many have questioned the accuracy of the phrase, as well as doubted the necessity or expediency of inventing any such doctrine. While a convenient phrase to express a certain general idea, it is not sufficiently precise or accurate to constitute a safe foundation upon which to build a set of legal rules. The doctrine was invented by Justice Story in *Wood v. Dummer*, 3 Mason [U. S.], 308, which called for no such invention, the fact in that case being, that a bank divided up two-thirds of its capital among its stockholders, without providing funds sufficient to pay its outstanding bill-holders. Upon old and familiar principles, this was a fraud on creditors. Evidently, all that the eminent jurist meant by the doctrine was, that corporate property must be first appropriated to the payment of the debts of the company before there can be any distribution of it among stockholders—a proposition that is sound, upon the plainest principles of common honesty. * * * The phrase that 'the capital of the corporation constitutes a trust fund for the benefit of creditors' is misleading. The corporate property is not held in trust, in any proper sense of the term. A trust implies two estates or interests—one equitable and one legal—one person as trustee holding the legal title, while another as the *cestui que trust* has the beneficial interest. Absolute control and power of disposition are inconsistent with the idea of a trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, as a natural person. It is a trustee for its creditors in the same sense, and to the same extent as a natural person, but no further."

In *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S., 587, it is said: "The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled, in equity, to have their debts paid out of the corporate property, before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of the property of the debtor, without authority of law and in fraud of existing creditors, is void as against them." This court has never had occasion to define its views of the subject under discussion, though it has recognized the existence of a personal trust relation between the officers of a corporation and its creditors.

In *Gorder v. Plattsmouth Canning Co.*, 36 Neb., 549, there was this holding as reflected in the fourth paragraph of the syllabus: "The relation of the directors to stockholders of a corporation is of a fiduciary character and their contracts and dealing with respect to the corporate property will be carefully scrutinized by the courts. Such contracts are not, however, necessarily void. Where it is clear that the transaction is in good faith on the part of the director and beneficial to the corporation which has, with the sanction of the stockholders, received and appropriated the consideration without offering to make restitution, it may be upheld when assailed even in a court of equity."

In *Ingwersen v. Edgecombe*, 42 Neb., 740, there was again involved the right of an officer to secure to himself a preference, and Post, J., delivering the opinion of this court said: "But the view which may be said to rest upon the soundest reasons and is sanctioned by the decided weight of authority is, that when a corporation becomes insolvent, its property and assets constitute a trust fund for the benefit of its creditors and that the directors and officers in possession thereof, being trustees for all the creditors, cannot take advantage of their position to se-

cure a preference for themselves but must share ratably with other creditors." In this last case it was held that the relations of the officers to the corporation were such that under the circumstances it amounted to securing an undue preference for one officer with the concurrence of another officer, to obtain security of an indebtedness due to himself from the corporation. The trust spoken of as having been violated was such as is implied from the relations and implied duties of an officer of a corporation toward his principal. This is illustrated by the holding in *Gorder v. Plattsmouth Canning Co.*, *supra*, that upon the showing therein made of fairness in every respect the mortgage of property of the corporation in favor of certain of its officers was valid. If what, in *Hospes v. Northwestern Mfg. & Car Co.*, *supra*, was called the "American doctrine" of trust funds had been applied, this holding would have been impossible, no matter how meritorious the claim secured.

It seems to us that the correct principle is enunciated in the federal cases above cited and in *Hospes v. Northwestern Mfg. & Car Co.*, *supra*. A court of equity, at the instance of proper parties in a proper proceeding, can, when the corporation becomes insolvent, administer such relief as the circumstances of each case may demand. The insolvency of the corporation, when it gave a preference, would in such a proceeding be a proper matter for consideration. If the corporation has fraudulently conveyed or incumbered its property, such property may be followed and subjected to the payment of the debts of the corporation. If the corporation has disposed of its property under unusual conditions, that fact is a circumstance properly to be taken into account. The effects of these circumstances are not properly determinable as matters of law, and we think it is from the failure to bear this in mind that plaintiff in error asks this court inflexibly to enforce the rule that an insolvent corporation cannot, in any case, prefer one of its creditors. In each case as it arises the question must be whether or not there has

been a disposition of the property of the corporation for the purpose of making a fraudulent preference or for other illegal purposes. As against a corporation in the class of actions of which we are now speaking, creditors have the same remedies and none other than against an individual debtor. The inferences to be deduced from the proofs are inferences of fact and not of law. It may be that the inference is unavoidable; it is none the less an inference of fact. Section 20, chapter 32, Compiled Statutes, provides that, "The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact and not of law," etc. The right of a debtor in good faith to prefer *bona fide* creditors has been repeatedly recognized by this court. (*Lininger v. Raymond*, 12 Neb., 19; *Grimes v. Farrington*, 19 Neb., 48; *Nelson v. Garey*, 15 Neb., 531; *Bierbower v. Polk*, 17 Neb., 268; *Costello v. Chamberlain*, 36 Neb., 45; *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 800; *Jones v. Loree*, 37 Neb., 816; *Farwell v. Wright*, 38 Neb., 445; *Kavanaugh v. Oberfelder*, 37 Neb., 649; *Sherwin v. Gaghagen*, 39 Neb., 238; *Hewitt v. Commercial Banking Co.*, 40 Neb., 820; *Grand Island Banking Co. v. Costello*, 45 Neb., 119; *Kilpatrick-Koch Dry Goods Co. v. Strauss*, 45 Neb., 793; *Powell v. Yeazel*, 46 Neb., 225.) While it may be true that from the inherent nature of a corporation, inferences unfavorable to a preference by it of certain of its creditors are justifiable from facts which would not sustain the same inferences with respect to a preference by a natural person, we cannot believe that the abstract legal right of making a preference in one class of cases is, by law, more restricted than is the other. The judgment of the district court is

AFFIRMED.

NORVAL, J., not sitting.

HENRY MOSEMAN ET AL., TRUSTEES, APPELLEES, V. JOHN
HEITSHUSEN ET AL., APPELLANTS.

FILED JANUARY 19, 1897. No. 7038.

1. **Deeds: CONDITIONS.** The condition in a deed upon which title of lands conveyed for church purposes shall revert to the grantor cannot be invoked by one faction of the grantee to the prejudice of another.
2. **Religious Societies: CIVIL COURTS.** Where the rights of a faction of a church to control its property or records are mainly dependent upon matters of religious doctrine, as to which the disputing factions entertain diverse views, civil courts should decline to interfere.

APPEAL from the district court of Burt county. Heard below before FERGUSON, J. *Reversed.*

Ira Thomas, for appellants.

H. H. Bowes, *contra.*

RYAN, C.

By their petition filed in the office of the clerk of the district court of Burt county, the appellees, as plaintiffs, alleged that in 1873 Simon and Mary Kerl, for church purposes, deeded to certain named persons, as trustees of the Lutheran Church of Burt and Dodge counties, a certain described forty-acre tract of land situated in Burt county, and that it was provided in said deed that "if said Lutheran Church shall be dissolved, or if some other religious society shall occupy said church and property," then thirty of the said forty acres should revert to the grantors. A considerable portion of the argument found in the briefs of the respective litigants is devoted to the discussion of the effect of certain acts of certain church factions as working a forfeiture under the terms of the aforesaid deed, but as the grantors in said deed are not parties to this action this discussion is entirely irrelevant. When the parties in interest seek a forfeiture it

will be time to consider this question and not till then. It is alleged in the petition that the members of the society to which said deed had been made on April 4, 1893, adopted the following preamble and resolution: "Whereas it appears that there is no record of the adoption of the constitution of this religious association or the change of name from the Lutheran church of Burt and Dodge counties to the St. Paul German Lutheran Church: Therefore, be it resolved, that we proceed to adopt a constitution to govern the association or church as provided in the deed from Simon Kerl." It was averred in the petition that the defendants voted against the adoption of the above preamble and resolution, and immediately following this averment were allegations in this language: "That after the adoption of said constitution the said members signed the same, except defendants herein, and adopted the following resolution by a unanimous vote; that the members of plaintiffs' faction are as follows: Henry Von Essen, T. D. Claussen, J. H. Kuhlman, H. Morsemann, Herman Von Essen, John Kuhlman, Mauritz Stevens, Otto Uehling, Gerard Havekost, Claus Hartz, R. C. Suhr, Jr., R. C. Suhr, Sr., John D. Suhr, Dietrich Stolle, Carl Kuenemann, Johannes Jopp, H. Heinrich Schutte, D. Herreilers. Resolved, that the name of this church be changed from the Lutheran Church of Burt and Dodge counties to the Evangelical Lutheran St. Paul's Church of Burt county and the vicinity." It was alleged in the petition that this resolution was published in the *Oakland Times* (presumably a newspaper) for three weeks as provided by law, and that prior to the adoption of said resolution plaintiffs had been duly elected trustees of said church, of which election a certificate was filed in the office of the county clerk of Burt county. It was further alleged by the plaintiffs that John Heitshusen, one of the defendants, had with force taken the records of this said church and turned them over to J. P. Kuehnert, and that both Heitshusen and Kuehnert refused to return them to plaintiffs, who, by law, are made the custodians

of said books and papers of said church; that Kuehnert is the minister the defendants desire to employ as minister in charge of said church, and that Kuehnert had threatened and was about to hold church in the church building of this society, and that unless restrained by an order of the court would break and enter said building; that there were fifteen members of said church as against nine of the defendants. From the foregoing averments of the petition we assume that plaintiffs claimed to assert certain rights by virtue of being the sole members of the church organization entitled to the possession and use of the property conveyed by Simon and Mary Kerl as well as of certain church records. The prayer of the petition accordingly was, in effect, that the defendants be enjoined from interfering with the exclusive rights claimed by the plaintiffs. The attitude of the contending parties toward each other was described in the petition in this language: "Said J. P. Kuehnert is a member of what is known as the Missouri Synod of the Lutheran Church. There is but little difference in the religious teachings of said two synods (the General Lutheran Synod of the United States and the Missouri Synod of the Lutheran Church), but there is a great difference in the government. The General Synod is much more liberal with its members than the Missouri Synod; said Missouri Synod is very strict in its control of its members; they insist upon the children of the members attending the parochial schools, and prevent members from joining any secret organization or secret society of any kind; the majority of this society desire to join the General Synod and have made application so to do; said Lutheran church of Burt and Dodge counties has never belonged to any synod; the buildings on the said land were built by the subscription of the several members at that time; said defendants, although in the minority, refuse to unite with the plaintiffs in joining the General Synod." It was further alleged in the petition that J. P. Kuehnert, as the minister in charge, contrary to the wishes of

plaintiffs, the trustees and the majority of the congregation of said church society, and said several defendants, threatened to, and would, if not prevented, although in the minority, turn over the property of said church to the Missouri Synod and join said Missouri Synod. There were issues duly joined between the litigants, and upon a final hearing there was a decree as prayed by the plaintiffs, from which the defendants appeal.

We have already indicated why there can be enforced in this case no forfeiture under the provisions of the deed of Simon and Mary Kerl. The denial of defendants' rights in the real property and the church records is a mere collateral incident to the matter chiefly sought to be enjoined, and that is the turning over of the church society to the control of the Missouri Synod. On the part of the defendants it was alleged that the original organization of this church society was in harmony with the doctrines of the Missouri Synod; that this relation still exists and that no one could become a member of said church society without working a fraud upon it, without agreeing to said constitution, and agreeing in doctrine and practice with said church and said Missouri Synod in all things. The essential differences of doctrine between the General Synod and the Missouri Synod are defined in the answer, according to the views of the defendants, with such circumstantial detail as show how important to them were these matters of faith in this action. If the action was one brought by the grantor to enforce the conditions of their deed there might be good reason for determining whether or not the donation had been diverted to an improper or unauthorized purpose. As it is, the real question is one of mere doctrine, into which civil courts are not equipped to inquire. (*Pounder v. Ashe*, 44 Neb., 672; *Powers v. Budy*, 45 Neb., 208.) The judgment of the district court is therefore

REVERSED.

RICHARD B. GRIFFITH V. SUSAN F. THOMPSON.

FILED JANUARY 19, 1897. No. 7019.

Statute of Frauds: VENDOR AND VENDEE. The statute of frauds relative to the sale of lands will not enable one who has obtained the title and possession of real property to avoid making payment therefor merely because there had been no formal acceptance in writing of the original written offer of the purchaser.

ERROR from the district court of Douglas county.
Tried below before HOPEWELL, J. *Affirmed.*

C. A. Baldwin and Weaver & Giller, for plaintiff in error.

Andrew Bevins, contra.

RYAN, C.

In the district court of Douglas county there was a verdict and judgment for the sum of \$478.78 in favor of Susan F. Thompson, the plaintiff in that court. We have carefully examined the evidence and find that the jury was justified in finding the averments of the petition sufficiently proved, and we shall therefore devote our attention to the question chiefly argued by the plaintiff in error, and that is, whether or not the petition in the district court stated a cause of action.

In her said petition, Mrs. Thompson alleged that previous to and until the year 1889 she was the owner of a life estate in a certain described tract of land containing 160 acres, more or less, situated in Douglas county; that said tract had been by her husband and herself mortgaged to secure payment of the sum of \$1,000; that Richard B. Griffith, with reference to said land, wrote to her the following letter:

“DEAR MOTHER: We got your letter and in regard to your farm I do not know what to say as I have got so much stock now, but I will make you an offer on it provided it is not sold. I will assume all indebtedness on

that farm and give you five hundred dollars. If you accept this offer come down, if not please come down anyway, as we are alone. Bring Dell along to stay this winter. The girls are at school in York. We are all well.

"Yours truly,

R. B. G."

In her petition Mrs. Thompson alleged that she accepted said proposition and that defendant immediately took possession by reason of such purchase, and still remains in possession, and that said agreement was fully performed on her own part and that, by consent of both parties, the real property was purchased by Griffith at a foreclosure sale of the aforesaid mortgage, whereby said Griffith secured a fee-simple title to said land. Mrs. Thompson further averred in her petition that after the sheriff's deed had been delivered to Griffith, he paid to her the sum of \$50 as part of the said purchase price of \$500, but that he has ever since refused to pay the balance, for which balance, with interest, she prayed judgment.

The theory of the plaintiff in error is that there was required to constitute a complete sale such specific averments of the making of a written contract by Mrs. Thompson as would amount to a compliance with section 5, chapter 32, Compiled Statutes, entitled "Frauds." If Mrs. Thompson was suing for an estate in the land, or for relief as against it, this position might be correct. Her action was not of that nature. In her petition she alleged a written offer to purchase, an acceptance, and, finally, a part payment of the purchase price. Whether or not the original written proposition was formally accepted became, under these circumstances, a matter of no importance with respect to the liability of Griffith for the unpaid purchase money. He, by virtue of the sheriff's sale, under his arrangement with Mrs. Thompson, had obtained the title and possession and thereby became liable to pay according to his promise. This action was solely to enforce performance of this promise,

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and the section of the statute of frauds invoked in avoidance of this liability was no defense. (*Harris v. Roberts*, 12 Neb., 631; *Galley v. Galley*, 14 Neb., 174.) The judgment of the district court is

AFFIRMED.

JOHN WILSON, SHERIFF, V. ROSS GAMBLE.

FILED JANUARY 19, 1897. No. 6876.

1. **Fraudulent Conveyances: CONSIDERATION: EVIDENCE: INSTRUCTIONS.** In a proceeding to avoid a sale of personal property as having been made in fraud of the rights of creditors of a firm, the circumstances that a part of the consideration for such sale was the cancellation of a debt by one partner, incurred before the partnership was entered into, and secured by an unrecorded chattel mortgage on the said property before the firm became its owner, was not one which would have justified an instruction that the sale was void, but was proper to be submitted as evidence bearing upon the good faith of such sale.
2. **Instructions: WEIGHT OF EVIDENCE.** An instruction by which the jury was sought to be directed what weight must be attached to certain facts developed by the proofs was, on that account, erroneous, and, therefore, properly refused.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J. *Affirmed.*

Lamb, Adams & Scott, for plaintiff in error.

H. M. Sinclair, E. C. Calkins, and *H. V. Calkins*, contra.

RYAN, C.

On the 18th day of February, 1890, George Ellis and J. S. Caldwell became partners under the firm name and style of "The Ellis & Caldwell Plumbing & Heating Company." Previous to the date just named George Ellis had individually carried on the business indicated by the above partnership name, and, on March 5, 1888, had mortgaged all his stock and tools to Ross Gamble to se-

cure three promissory notes each for the sum of \$558.84. This mortgage was never recorded. On the 4th of December, 1890, Jacob S. Caldwell and George Ellis, by a bill of sale, transferred their entire partnership property and immediately gave possession thereof to the grantee, Ross Gamble. The consideration named was \$4,000. On the 8th day of December, 1891, John Wilson, the sheriff of Kearney county, levied on said property two executions which had been issued on judgments rendered against said partnership firm. Ross Gamble, as the owner entitled to recover possession from the sheriff, immediately replevied the property, and upon a trial had in the district court of Kearney county there was a verdict and a judgment in his favor. The plaintiff in error insists that the transfer to Gamble was fraudulent as against the creditors of The Ellis & Caldwell Plumbing & Heating Company, and accordingly reviews the proofs to establish this proposition. The verdict of the jury is found, upon examination of the proofs, to be sufficiently supported in that respect, and the errors, if any there are, must be found in other directions.

It is first urged that when a firm is insolvent the partnership property will be applied to the payment of the partnership debts and that a creditor of an individual partner is not entitled to be paid out of such property in preference to partnership creditors. The principle, thus broadly urged, even if conceded to be correctly stated, is not applicable to the facts which the evidence adduced by the defendant in error tended to establish. Mr. Gamble and Mr. Ellis testified that when the partnership agreement was being formulated, Mr. Caldwell was told of the existence of the mortgage made by Mr. Ellis to Mr. Gamble and entered into said partnership in view of that fact. It is true Caldwell testified that Mr. Ellis said he would take care of this mortgage, but there was no proof that this was assented to by Mr. Gamble. When the members of the partnership firm found they could not amicably continue their partnership relations they agreed to

sell their entire stock, tools, and books of account to Ross Gamble, and that the amount secured by the mortgage to him should be reckoned a part of the consideration. Under this agreement the transfer of the title and possession took place as has heretofore been stated, and after deducting certain sums due from the firm, together with the amount secured by the mortgage, the balance was paid in cash and a promissory note of Mr. Gamble due one year from its date, which was December 4, 1890. This note was, therefore, past due when the levies of execution were made on December 8, 1891, and the uncontradicted evidence was of its complete payment in the meantime. Under these circumstances the court very properly, in its instructions to the jury, used the language against which the present criticism of the plaintiff in error is directed, which language is as follows: "If you believe from the evidence that at the time of the alleged sale to the plaintiff * * * Ellis was indebted to the plaintiff for money to purchase goods before Caldwell entered into partnership with Ellis, and that Caldwell, as one of the members of the firm, agreed and consented that such indebtedness should be satisfied, and as a part consideration of the purchase price by such sale, and the sale was in all other respects made in good faith for a valuable consideration and without intent to defraud, delay, or hinder the creditors of Ellis and Caldwell, then such sale would be valid and plaintiff would be entitled to recover." In view of the propositions already stated, it is scarcely necessary to say that there was no error in receiving in evidence the chattel mortgage above referred to, and this disposes of all the assignments argued except one, which we shall now consider.

It is urged that there was error in refusing to instruct the jury that as to the matters above discussed the length of time which elapsed after the alleged sale before the executions were levied had no effect and should be given no weight by the jury. This would have been to direct that no importance could be attached to the cir-

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cumstance which, from the detailed statement of facts hereinbefore given, might have been quite important in its bearing. This instruction was, therefore, properly refused. The judgment of the district court is

AFFIRMED.

NORFOLK NATIONAL BANK V. MINNA NENOW.

FILED JANUARY 19, 1897. No. 6971.

1. **Pledge by Husband: NOTICE OF WIFE'S TITLE: PROMISSORY NOTE.**

A father owned a negotiable note payable to his order, secured by a real estate mortgage. Before the maturity of the note he gave it to his daughter, and at the same time duly executed and delivered to her an assignment of the mortgage. The daughter delivered the note and mortgage assignment to her husband for deposit in a bank for collection. The husband borrowed money of the bank and pledged the note as security. *Held*, That the mortgage assignment accompanying the note was sufficient to put the bank on inquiry as to the husband's title to the note.

2. **Husband and Wife: PRINCIPAL AND AGENT.** A husband may act as the agent of his wife, but in order to bind her he must previously be authorized, or she must, with a knowledge of his acts, subsequently ratify them.

ERROR from the district court of Madison county.
Tried below before JACKSON, J. *Affirmed*.

Powers & Hays, for plaintiff in error.

Mapes & Hazen, contra.

RAGAN, C.

In the district court of Madison county, Minna Nenow sued the Norfolk National Bank, alleging for cause of action that about October, 1891, she left with the bank for collection, a note which she owned; that the bank had collected the note and refused to pay to her its proceeds. The defense of the bank was that about the 1st of Janu-

ary, 1892, the husband of Mrs. Nenow became indebted to it for which he executed his note, and to secure the payment of the same he "turned over and caused to be assigned" to the bank the note of Mrs. Nenow, with her knowledge and consent, and that it had collected Mrs. Nenow's note and applied the proceeds to the husband's debt. Mrs. Nenow had a verdict and judgment and the bank has prosecuted here a petition in error.

1. The first argument is that the verdict is unsupported by sufficient evidence. The evidence is uncontradicted that on the 20th of June, 1887, one William Boche executed his note for \$200, due two years after date, payable to the order of Carl Hille to whom said note was delivered, and secured the payment of the same by a real estate mortgage. Carl Hille was the father of the defendant in error, and sometime in January, 1888, he made her a present of this note and delivered it to her and at the same time duly executed and acknowledged and delivered to her an assignment of the mortgage securing the note. This note—the assignment of the mortgage being therewith, the note at the time not being indorsed by the defendant in error—was delivered by the husband to the bank as collateral security for a debt he owed it, and the note subsequently collected by the bank and the proceeds applied towards the liquidation of the husband's debt. There is a conflict in the evidence as to what indorsements were on the note at the time the bank received it; but the evidence tends very strongly to show that the note at that time was indorsed "Pay to the order of Minna Nenow. Carl Hille." The theory of Mrs. Nenow was—and the evidence introduced in her behalf tends to support it—that she placed this note in her husband's hands and instructed him to deposit it in the bank for collection; that she did this because her father had told her to do so; that soon after the note was so deposited she called at the bank and inquired if it had been collected and was informed that it had not; that she did not know that her husband was indebted to the bank;

that she never authorized him to collect the money on the note nor authorized him to pledge it as security for his debt; and that shortly before the suit was brought, upon inquiring of the bank if it had collected the note, she was informed by its officers that it had, and had applied the proceeds to her husband's debt; and this was the first intimation she had that her note had been thus disposed of by her husband. As already stated, the defense of the bank was that the note was assigned to it by Mrs. Nenow's husband, as security for his debt, with her knowledge and consent. There is not a word of evidence in the record to sustain this defense. About the 30th of December, 1891, the bank sent for Mrs. Nenow and induced her to execute to it an assignment of the mortgage securing the note; and the evidence introduced on its behalf tends to show that at that time some of the officers of the bank informed Mrs. Nenow that they held the Hille note as security and that she consented thereto. But the bank's evidence also shows that at this very time she told the bank officers that when the money was collected on the Hille note that it was hers; that her father had given it to her; and it is impossible to resist the conclusion that she executed this assignment to enable the bank to collect the money on the Hille note, expecting when it was done that the money would be paid to her; and subsequent to this time she called at the bank and asked for the money. Without quoting further from the evidence we think the verdict rendered is the only one that could have been rightly rendered. When this note was delivered to the bank by the husband, the assignment of the mortgage that accompanied it showed on its face that this note belonged to Mrs. Nenow. This was sufficient to put the bank on inquiry as to the husband's title to this note. The evidence sustains the verdict.

2. Another assignment is that the court erred in giving instruction No. 5 to the jury. This instruction was as follows: "If you find from a preponderance of the evidence that the plaintiff placed the note in controversy in

the defendant bank for collection, and for no other purpose, and that the defendant has collected the note and has failed to deliver to the plaintiff the proceeds thereof, and that the plaintiff was the owner of the note, then your verdict should be for the plaintiff." Counsel say that the instruction enunciated a correct principle of law but there is no evidence on which to base this instruction. This contention is groundless, as Mrs. Nenow testified that after her father gave her the note she talked with him about how it was to be collected; that she did not know what to do with it; that he told her to take it down and have the bank collect it; that she could not go there; she did not know "how to start," and that she had "her man" take it there. It is true that this testimony is not so concise as it would have been had this woman been an educated English lady,—as it seems that she was an illiterate German,—but nevertheless the evidence is clear enough for ordinary understanding. The court did not err in giving the instruction.

3. Another assignment is that the court erred in giving an instruction in the following language: "You are instructed that property coming to the wife by gift is not subject to the disposition of the husband, nor is it liable for his debts, unless she voluntarily pledges her property or creates a lien thereon for that purpose." There was no error in giving this instruction.

4. Counsel for the bank have argued this case throughout upon the theory that Mrs. Nenow put this note in the hands of her husband for collection by him. The bank pleaded no such defense nor is there any evidence in the record which tends to show such a state of facts. The evidence and all the evidence on the subject tends to show that the wife made the husband her agent for the special purpose of leaving this note with the bank for collection by it. The husband having this special authority was not thereby clothed by his principal with authority to collect the note, much less with authority to pledge it for his own debt. An agent employed for a

special purpose derives from this no general authority from his principal. If such an agent exceed his authority the principal is not bound. (*Matthews v. Soule*, 12 Neb., 398.)

5. Counsel for the bank insist that even if the husband had not the authority which he exercised, nevertheless the bank was justified in assuming that he had such authority, because of the relation of husband and wife; and, was, therefore, justified in dealing with the wife's property found in the husband's possession as the husband's property. We cannot agree to this contention as applied to the facts of this case. Generally a husband may act as the agent of his wife, but in order to bind her he must previously be authorized to so act or she must, with a knowledge of his acts, subsequently ratify them. In the case at bar the husband was not authorized by the wife to make the disposition which he did of the Hille note, nor does the evidence show that the wife ratified his unauthorized act. Here the property of the wife in the husband's possession was a negotiable promissory note, probably indorsed payable to her order. With the note was an assignment of the mortgage which secured its payment made to the wife. This pointed definitely to the conclusion that the wife owned the note; and if there was not thereon an express indorsement to her, still the bank had no right to assume that the husband owned the note because in his possession. The judgment of the district court is right and is

AFFIRMED.

GREELEY STATE BANK, APPELLEE, V. THOMAS H. LINE,
APPELLANT, ET AL.

FILED JANUARY 19, 1897. No. 6722.

1. **Mortgages: EVIDENCE OF EXECUTION.** A real estate mortgage duly witnessed and acknowledged is of itself *prima facie* evidence that the mortgagor signed said mortgage.
2. ———: **EQUITABLE ASSIGNMENT OF NOTE: INDORSEMENT.** An equitable assignment of a negotiable promissory note, secured by a mortgage, may be made by a sale and delivery thereof by the person to whose order the note is payable, without an indorsement of the note or a formal assignment in writing of the mortgage or note; and such purchaser may maintain an action in his own name to foreclose said mortgage.

APPEAL from the district court of Hamilton county.
Heard below before BATES, J. *Affirmed.*

Whitmore & Carr and Howard M. Kellogg, for appellant.

References: 1 Daniels, Negotiable Instruments, sec. 812; 1 Randolph, Commercial Paper, sec. 13; Tiedeman, Real Property, sec. 328; 15 Am. & Eng. Ency. Law, 843, 849; *Richards v. Kountze*, 4 Neb., 200; *Daniels v. Densmore*, 32 Neb., 40.

J. R. Hanna, *contra*.

RAGAN, C.

The Greeley State Bank brought this suit in the district court of Hamilton county against Thomas H. Line and wife. In its petition the bank alleged that on the 22d day of July, 1889, Line made and delivered to the Capital Loan & Investment Company, a corporation, a promissory note payable to the order of such corporation and due six years after date, together with interest thereon; and on the same date, to secure the payment of said note, Line and his wife executed and delivered to said corporation a mortgage upon certain real estate in Hamilton county; that before the maturity of such note, and for a valuable

consideration, in the ordinary course of business, such corporation sold and assigned said note and mortgage to it, the bank; that the bank was the owner and holder of the note and mortgage, and that no part of the same had been paid and that default had been made in the payment of the interest reserved, whereby the whole debt had become due. There was the usual prayer for an accounting and a decree of foreclosure. The answer of Line to this petition was a general denial. The district court rendered a decree as prayed and Line has appealed.

1. The appeal presents the question of the sufficiency of the evidence to sustain the decree. The argument that the decree is not sustained by sufficient evidence is directed to two issues. First—It is insisted that the evidence upon which the district court acted was insufficient to justify its finding that Line executed the note and mortgage. This contention does not merit serious consideration. Line offered no evidence on the trial of the action, and while no one testified for the bank that the signature on the note and mortgage was Line's, the court had before it certain letters written by Line to the bank in reference to the note and mortgage in suit, and we think the court was justified in finding from these letters alone that Line had executed the note and mortgage. The note which the mortgage was given to secure was described in the mortgage, and the latter was duly witnessed and acknowledged. The mortgage, having been witnessed and acknowledged, was of itself evidence that it had been executed by Line. It was not conclusive evidence of that fact, but it was sufficient, in the absence of any evidence on the part of Line that he did not execute it, to justify a finding that he had.

2. The second contention is that the finding of the district court that the Capital Loan & Investment Company sold and assigned the note and mortgage in suit to the bank has no evidence to support it. The cashier of the bank testified that the bank was the owner of the note and mortgage, and that it purchased it before due. The

bank produced on the trial the note and the mortgage and put them in evidence. The note was not indorsed by the Capital Loan & Investment Company, the original payee thereof, nor was there before the court any competent evidence that the investment company had ever made and delivered to the bank an assignment in writing of the note or mortgage. We have, then, the question whether the owner and holder of a negotiable promissory note secured by a mortgage, to whom they have been delivered by the original payee thereof without an indorsement of the note or an assignment in writing of the note or mortgage, may maintain an action to foreclose.

Our Code of Civil Procedure, section 29, provides that every action must be prosecuted in the name of the real party in interest, except in certain cases not material here.

In *Nelson v. Ferris*, 30 Mich., 497, it was held that one who purchased a note secured by a mortgage, and took no legal transfer by indorsement of the note or written assignment of the mortgage, acquired only an equitable interest in the mortgage and note, but that such interest would enable him to deal with the mortgage and note for all "beneficial purposes."

In *Haescig v. Brown*, 34 Mich., 502, a husband owned a note payable to his order, secured by a real estate mortgage. In satisfaction of a claim of the wife, he delivered her this note and mortgage without an indorsement of the note or an assignment of the mortgage. Subsequently the husband formally assigned in writing, but without delivery, this note and mortgage to a third party. The mortgagor, with notice of the assignment, paid the mortgage debt in full to the wife, and then instituted an action to enjoin the husband's assignee from prosecuting a suit to foreclose under the formal assignment. The court held that he was entitled to maintain the action and held, in effect, that the delivery of the note and mortgage, unindorsed and unassigned, by the husband to the wife vested in the latter the equitable title to the same.

In *Baker v. Armstrong*, 57 Ind., 189, it was held that a married woman, with the consent of her husband, might make an equitable assignment of a note and mortgage executed to her by a sale and a mere delivery of the same to another. To the same effect see *Andrews v. Powers*, 35 Wis., 644; *Kamena v. Huelbig*, 23 N. J. Eq., 78; *Strause v. Josephthal*, 77 N. Y., 622.

In *Yunker v. Martin*, 18 Ia., 143, it was held that the holder without indorsement of a promissory note, payable to the order of the payee, might maintain an action thereon in his own name. Dillon, J., speaking for the court, said: "Notes are choses in action; that is, things which must be recovered by action at law, and, like all other things in action, they may be assigned and the title will pass without indorsement."

In *Crain v. Paine*, 4 Cush. [Mass.], 483, the owner of a note, payable to his order and secured by a mortgage, sold and delivered the note and mortgage to a third party without indorsing the note or making any written assignment of the note or mortgage, and the court held that such third party by the transaction became the equitable owner of the note and mortgage, and was entitled to maintain an action.

In *Willard v. Moics*, 30 Mo., 142, the court held that "no written assignment of a promissory note is necessary in order to entitle the holder to sue thereon in his own name."

From these authorities we conclude that an equitable assignment of a negotiable promissory note secured by a mortgage may be made by a sale and delivery of them, or the note, by the person to whose order the note is payable, without an indorsement of the note or formal assignment in writing of the mortgage or note; and that such purchaser may maintain an action in his own name to foreclose such mortgage. Applying this rule to the case at bar, the finding of the district court that the bank was the owner and holder of the mortgage in suit was supported by sufficient competent evidence and was correct.

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It was not necessary that the bank should produce an indorsement of the note from the original payee thereof, nor a formal assignment in writing from such payee to it of the note or mortgage. When the evidence disclosed that the bank purchased the note and mortgage; that they were delivered to it; that it was the owner of them and that the note was due and unpaid, it was entitled to the decree it prayed for. The judgment of the district court is

AFFIRMED.

HOWARD WHITNEY, SHERIFF, V. GRETNA STATE BANK.

FILED JANUARY 19, 1897. No. 7016.

1. **Partnership: EVIDENCE OF MEMBERSHIP.** The receipt by a party of a share of the profits of a venture merely as compensation for services, such party having no interest in the property made the subject of the venture and no power in the management or control of such property other than that of an ordinary retail salesman thereof, does not constitute such person a partner. *Aetna Ins. Co. v. Bank of Wilcox*, 48 Neb., 544, followed.
2. **Rejected Evidence: HARMLESS ERROR.** It is not reversible error for a court to reject an offer of competent and relevant evidence if the evidence rejected, when considered with all other evidence bearing on the issue to which it was directed, would not support the conclusion sought to be established by the rejected evidence.

ERROR from the district court of Sarpy county. Tried below before KEYSOR, J. *Affirmed.*

Charles B. Keller and Clinton N. Powell, for plaintiff in error.

Gregory, Day & Day, contra.

RAGAN, C.

This is an action in replevin for a stock of goods, brought in the district court of Sarpy county by the

Gretna State Bank against Howard Whitney, sheriff of said county. The bank's claim was that the goods belonged to A. U. Hancock; that he became indebted to it, the bank, in a large sum of money and pledged the goods by chattel mortgage to it to secure his debt. The sheriff claimed that the goods, after and before the making of the bank's mortgage, were the property of A. U. Hancock and S. E. Wolverton; that these two parties were copartners; that he had seized the goods as theirs by virtue of certain attachments issued at the instance of their creditors. The case was tried to the court without a jury, a finding and judgment rendered in favor of the bank, and the sheriff prosecutes here a petition in error.

1. It is insisted that the finding of the court that the mortgaged property was the individual property of A. U. Hancock and that Hancock and Wolverton were not copartners is not supported by sufficient evidence. The evidence shows without substantial conflict that Hancock established a general store at Gretna, Nebraska; that he furnished all the capital that went into that business; that Wolverton never furnished any capital for the venture; that Hancock employed Wolverton to conduct the store, and in lieu of a salary promised to pay him as compensation for his services "a living out of the business," and if the venture proved profitable, one-half of the profits. The evidence further discloses that Wolverton took charge of the store and conducted the business under this agreement as clerk and manager; that he and Hancock held themselves out to the world as copartners, and on their letter-heads they designated themselves as A. U. Hancock & Co.; that in their reports to commercial agencies they held themselves out as copartners and that the creditors represented by the sheriff in this suit believed they were copartners, and relying upon that gave them credit. If this was an action by some creditor of Hancock & Co. against Hancock & Wolverton to recover a debt for goods he had sold them, relying upon the fact that they were copart-

ners, we have not the slightest doubt but that Hancock & Wolverton, by reason of their conduct, would be estopped as against such creditor from asserting that they were not in fact copartners. But this is not the case before us. The question presented to us is: Were these men in fact copartners? Was the property involved in this action copartnership property or was it the property of Hancock? The relation of copartners rests in contract. Whether two or more persons are copartners depends upon intention, and while a copartnership may be established by the course of dealing and the conduct of the parties, and perhaps by the admission of each member thereof, still the relation, if it exists, must rest in the consent and the intention of the parties thereto. It is sometimes said in the books that parties, by their course of dealing, may make themselves partners as to creditors notwithstanding they were not in fact partners; but this expression is not strictly accurate. An examination of all those cases, we think, will show that where parties who were not partners have, nevertheless, been held liable as such, they were so held liable because by their conduct they had estopped themselves from averring that they were not partners; but in no case that I have been able to find has any court assumed to hold that two or more persons were copartners as a matter of law when the persons had never agreed or intended to become such. The fact that Wolverton was to receive as compensation his living from the business and was to receive a share of the profits of the venture if it should prove profitable, would not alone support a finding that Wolverton and Hancock were copartners. It takes more than that to constitute a copartnership. Wolverton had no interest in the subject-matter of the venture. He had no power in the management or control of this venture other than that of an ordinary retail salesman. In *Ætna Ins. Co. v. Bank of Wilcox*, 48 Neb., 544, the precise question presented here was decided and the court held: "The receipt by a party of a share of the profits of a venture

merely as compensation for services, such party having no interest in the property made the subject of the venture, and no power in the management or control of such property other than that of an ordinary retail salesman thereof, does not constitute such person a partner." The decision in this last case followed *Waggoner v. First Nat. Bank of Creighton*, 43 Neb., 84, and *Gibson v. Smith*, 31 Neb., 354. We have been to some pains to re-examine this question, and we are satisfied that the rule announced in the cases referred to is supported by the great weight of authority.

2. The mortgage in controversy was filed and possession of the goods taken by the bank on the 17th of October, 1891. On the 19th of that month Wolverton wrote to one of the creditors represented by the sheriff here the following letter:

"GENTLEMEN: Yours of the 19th at hand and would say that our affairs are in the hands of a bank receiver. Everything is out of our control. Mr. Hancock's individual liabilities were so large that he had to mortgage everything that he had to the bank."

On the trial counsel for the sheriff offered to read this letter in evidence. The court rejected the offer and it is now insisted that this action of the court was erroneous. Treating this letter as a declaration and admission by Wolverton that he and Hancock were partners and that it was competent and relevant evidence,—a point not decided,—we are clearly of opinion that the plaintiff in error was not prejudiced by the court refusing to consider this letter in evidence, for the reason that if the letter be considered in evidence with all the other evidence bearing on the issue to which it was directed, the court would still not have been justified in finding that Wolverton and Hancock were copartners.

3. On the trial of the case the books of account used at the Hancock store were brought into court by a subpoena. These books, at the request of the sheriff, were examined by a gentleman and he was then called as a

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witness and the sheriff offered to prove by him that he had examined the books and that the account therein between Hancock & Co. and the bank did not show any entry with reference to a note which Hancock claimed he had sold to the bank; and that the books did not show that the money which it was claimed the bank had furnished to Hancock on the note discounted went into the business of the store. The refusal of the court to permit this testimony to be given is the final assignment of error argued here. We think the evidence offered was wholly immaterial. It did not tend to prove or disprove any issue being litigated. If Hancock discounted a note at the bank and neglected to make memoranda thereof on his account books the absence of such memoranda would not tend to prove that the bank had not discounted the note; and certainly the bank was under no obligation in this case to see that Hancock appropriated the money loaned to him towards the conduct of the store. The judgment of the district court is right and is

AFFIRMED.

AULTMAN, MILLER & COMPANY, APPELLANT, v. J. T.
WARD ET AL., APPELLEES.

FILED JANUARY 19, 1897. No. 7025.

Vendor and Vendee: CONSIDERATION: EVIDENCE. Evidence examined, and held to sustain the findings of the district court (1) that the appellees were innocent purchasers, for a valuable consideration, of certain real estate; (2) and that appellees never assumed and promised to pay the judgment of appellant.

APPEAL from the district court of Lancaster county.
Heard below before STRODE, J. *Affirmed.*

Davis, Hibner & Whitmore, for appellant.

F. E. Brown and S. L. Geisthardt, contra.

RAGAN, C.

J. T. Ward executed and delivered two promissory notes to Aultman, Miller & Co., hereinafter called "Aultman." On the 18th of March, 1889, Aultman sued Ward on these notes before a justice of the peace of Lancaster county. Counsel for Aultman used the notes in lieu of a bill of particulars. By mistake the summons was directed to S. T. Ward, and, though personally served on J. T. Ward, was returned as served on S. T. Ward. J. T. Ward made no appearance in the action, and judgments by default were rendered on the notes against S. T. Ward. In January, 1890, a transcript of these judgments was duly filed and docketed in the office of the clerk of the district court of said Lancaster county. At the time of the filing of this transcript J. T. Ward was the owner of a tract of land in said Lancaster county, and afterwards, in May, 1890, he sold and conveyed such real estate to Levi Ward and Mary H. Ward. In December, 1892, Aultman brought this suit in the district court of Lancaster county, making J. T. Ward, Levi Ward, and Mary H. Ward defendants. Aultman, in his petition, set out the facts already enumerated, and also alleged that Levi Ward and Mary H. Ward had assumed and agreed to pay the Aultman judgments in consideration of the conveyance to them of the land by J. T. Ward. Aultman prayed that the judgments rendered before the justice of the peace, and the transcript thereof docketed in the office of the clerk of the district court, might be amended into judgments against J. T. Ward, instead of S. T. Ward, and declared a lien upon the real estate conveyed by J. T. Ward from the date of the filing of such transcript, and for a personal judgment against Levi Ward and Mary H. Ward for the amount of such judgments. Levi and Mary H. Ward defended the action upon the ground that they had purchased the real estate of J. T. Ward for a valuable consideration, without knowledge, actual or constructive, of the Aultman judgments, and denied that they ever

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assumed or promised to pay such judgments. The district court found that Levi and Mary H. Ward purchased the real estate of J. T. Ward on May 6, 1890, in good faith and for a valuable consideration, and without any knowledge, either actual or constructive, of the Aultman judgments; and further found that they never assumed or promised to pay those judgments, and entered a decree that they "go hence without day and recover their costs." The court also entered a decree in favor of Aultman amending the judgments and the transcript thereof so as to make the judgments of record against J. T. Ward. From this decree Aultman has appealed.

The entire argument of the appellant is directed to the contention that the findings of the district court are not sustained by sufficient evidence. We think they are. Indeed, we think under the evidence the court would not have been justified in rendering any other decree than the one it did. Levi and Mary H. Ward are innocent purchasers for value of the real estate upon which it is sought to fasten the lien of the Aultman judgments, and they became such purchasers for value, parted with before either actual or constructive notice of the Aultman judgments, and there is no room in the record for the contention that they assumed or agreed to pay the Aultman judgments as a part of the consideration for the conveyance to them of the real estate. The appellant, by the decree of the court, has succeeded in having a judgment which was rendered against S. T. Ward amended and changed so as to be a judgment against J. T. Ward, the party sued, and as such it stands of record in the office of the clerk of the district court of Lancaster county, and from the date of the decree appealed from it became a lien upon any real estate that J. T. Ward owned in that county. This was all the appellant was entitled to. The appeal is entirely without merit and the decree of the district court is

AFFIRMED.

SARAH C. SMITH V. WILLIAM H. BEAGLE.

FILED JANUARY 19, 1897. No. 6993.

Transcript for Review. The filing of the original pleadings and other documents belonging to the records of the district court does not take the place of the certified transcript which the statute requires as a foundation for appellate proceedings, even though the parties may stipulate to that effect. *Moore v. Waterman*, 40 Neb., 498, followed.

ERROR from the district court of Valley county. Tried below before HARRISON, J. *Affirmed*.

Coffin & Stone and C. A. Munn, for plaintiff in error.

A. M. Robbins, *contra*.

IRVINE, C.

We have in this case, properly authenticated, a bill of exceptions and a transcript of the verdict, motion for new trial, and judgment. In addition to this there is a bundle of loose papers which look as if they might be the original files from the office of the clerk of the district court, but not authenticated as such, and a stipulation of counsel that the original files may be used in lieu of a transcript. This does not comply with the statutes regulating proceedings in this court. (*Moore v. Waterman*, 40 Neb., 498; *Bell v. Beller*, 40 Neb., 501; *School District v. Cooper*, 44 Neb., 714; *McDonald v. Grabow*, 46 Neb., 406; *Otis v. Butters*, 46 Neb., 492; *Peck v. Nebraska Loan & Trust Co.*, 50 Neb., 227.) Without a transcript of the pleadings we are unable to examine the evidence to ascertain whether it was sufficient to support the verdict, as we have no means of determining what was in issue. Nor have we the instructions before us for examination. All assignments of error relate to questions of this character.

AFFIRMED.

HARRISON, J., not sitting.

WILLIAM H. BEAGLE, SHERIFF, v. LAURA A. SMITH.

FILED JANUARY 19, 1897. No. 6986.

1. **Execution:** LEVY: REPLEVIN: PROPERTY IN CUSTODIA LEGIS. When property has been levied upon on writ of execution and has been delivered to a third person, plaintiff in a replevin suit against the officer making the levy, such property cannot be again seized by the officer under another writ against the same person while the replevin suit is pending.
2. **Pleading:** EXECUTION: REPLEVIN: TROVER. An action in the nature of trover was brought against a sheriff, who answered justifying his acts under a levy of a writ of execution directed against a third person, by whom it was alleged the property had been fraudulently conveyed to the plaintiff. The plaintiff replied that prior to the levy the same officer had levied upon the same property by virtue of another writ against the same grantor; that plaintiff had replevied from the officer, and that the replevin suit was still pending. *Held*, That such matter was properly pleaded in the reply.

ERROR from the district court of Valley county. Tried below before HARRISON, J. *Affirmed*.

A. M. Robbins and E. J. Babcock, for plaintiff in error.

References: *Hastings School District v. Caldwell*, 16 Neb., 68; *Holmes v. Bailey*, 16 Neb., 300; *Zunkle v. Cunningham*, 10 Neb., 162; *Davidson v. Waldron*, 31 Ill., 120; *Mulligan v. Bailey*, 28 Ga., 507; *Bernheimer v. Marshall*, 2 Minn., 61; *Webb v. Bidwell*, 15 Minn., 394; *Hatch v. Coddington*, 32 Minn., 92; *Gregory v. Karr*, 36 Neb., 533; *First Nat. Bank v. Gerson*, 32 Pac. Rep. [Kan.], 907; *Bruner v. Dyball*, 42 Ill., 34; *Lovett v. Burkhardt*, 44 Pa., 174; *Moore v. Herron*, 17 Neb., 701; *Hunt v. Robinson*, 11 Cal., 262.

Coffin & Stone and C. A. Munn, contra.

IRVINE, C.

This was an action by Laura A. Smith against Beagle, the sheriff of Valley county, for the conversion of certain

horses. The sheriff justified by alleging that the property had been fraudulently conveyed by Shelby L. Smith to the plaintiff, and that he had seized it under certain writs of attachment and execution against Shelby L. Smith. The plaintiff in reply, among other things, pleaded that prior to the levy alleged in the answer the property had been seized by Beagle under another writ against Shelby L. Smith; that the plaintiff had replevied the property from him, and had given bond; and that the property had been delivered to the plaintiff under the writ of replevin. There was a verdict and judgment for the plaintiff. The petition in error contains fifty-seven assignments of error, but all of those discussed in the brief relate to the matter pleaded in reply. The defendant raised the question in the first place by moving to strike from the reply the allegations referred to; in the second place, by objecting to the admission of the evidence in support of those allegations; and in the third place, by excepting to a peremptory instruction to find for the plaintiff as to such property as the evidence disclosed she held by virtue of the first writ of replevin. It is not contended that the evidence did not warrant a peremptory instruction provided the facts pleaded required, as a matter of law, a verdict for the plaintiff. Two questions are thus presented: First, when property has been levied upon on a writ of execution and has been delivered to a third person, the plaintiff in a replevin suit against the officer making the levy, can such property be again seized by the officer under another writ against the same defendant while the replevin suit is pending; and second, was such matter properly pleaded in reply?

The first question must be answered in the negative. (*Acker v. White*, 25 Wend. [N. Y.], 614; *Selleck v. Phelps*, 11 Wis., 380; *Bates County Nat. Bank v. Owen*, 79 Mo., 429; *Rhines v. Phelps*, 3 Gilm. [Ill.], 455; *Pipher v. Fordyce*, 88 Ind., 436.) The case of *Hagan v. Lucas*, 10 Pet. [U. S.], 400, supports the doctrine of the other cases cited in its reasoning, although the question there was upon levies

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made in one case by a sheriff and in the other by a United States marshal. Property taken under a writ of replevin from an officer who has seized it on execution remains *in custodia legis*, although it has been delivered to the plaintiff. The lien acquired by the levy while suspended is not destroyed, and should judgment be rendered for the defendant in the replevin case it would be for a return of the property or for its value, or at least for the value of the officer's interest therein. The bond binds the plaintiff to that effect. To hold that while a plaintiff so holds property it may be again seized under other writs against the same person, would, as pointed out in the cases cited, work manifest injustice. It would follow either that the replevin bond would be discharged, in which event the defendant in the replevin case would unjustly suffer, or else the property would be liable to be subjected not only once, but as frequently as the writs might be issued, to the satisfaction of the debts of the same person; but either result would be intolerable. The plaintiff in error seeks to avoid the operation of the rule on the ground that the first replevin action was fraudulent, and in support of his argument cites *First Nat. Bank v. Gerson*, 32 Pac. Rep. [Kan.], 905. But the rule there laid down related to a case where both the first levy and the replevin suit were collusive for the purpose of placing the property *in custodia legis*, and thereby defeating creditors. It is not contended here that the first levy was collusive or fraudulent, nor that the replevin suit was the result of collusion between the plaintiff therein and the sheriff, or the plaintiff to the first writ. The contention merely is that the claim of this plaintiff and the plaintiff in replevin was fraudulent as against the creditors of Shelby L. Smith. That would be a matter of defense in the replevin suit, but it did not avoid jurisdiction in that or in the action wherein the first levy was made. We think this matter was properly pleaded in the reply. The plaintiff claimed a general ownership both in the replevin suit and in this. Therefore there is no inconsistency in claiming in this

the right of possession also by virtue of the writ of replevin. The defendant specially pleaded justification under the later writs, and it was perfectly proper in reply to plead facts showing that aside from the main matters in issue the later levies were illegal. The plaintiff pleaded and proved good title, unless it might be against creditors of Shelby L. Smith enforcing their demands by valid legal process, and such process being first alleged in the answer, matter in avoidance of its legality might properly be pleaded in the reply.

AFFIRMED.

HARRISON, J., not sitting.

JAMES MORAN, SR., V. ENOS MCCULLUM.

FILED JANUARY 19, 1897. No. 6990.

Continuance: JUSTICE OF THE PEACE. A party to an action before a justice of the peace, who has obtained one adjournment, cannot procure another extending more than thirty days from the return day, on a general affidavit in the language of section 960 of the Code of Civil Procedure. For that purpose he must comply with section 961.

ERROR from the district court of Nuckolls county.
Tried below before HASTINGS, J. *Affirmed.*

Buck & McConnell, for plaintiff in error.

Searle & Coleman, *contra.*

IRVINE, C.

McCullum brought an action in replevin against Moran before a justice of the peace. On the return day an adjournment was granted, on the request of the defendant and by consent of the plaintiff, for seventeen days. When the day to which the cause stood adjourned came, the de-

fendant filed a motion for an adjournment for thirty days further and supported the same by his affidavit as follows: "James Moran, the defendant in this action, being first duly sworn, on his oath says he cannot safely proceed with the trial of said action at this time for the want of material testimony for the defense which he expects to procure. Wherefore he requests of the court that said cause may be continued for thirty days from this date." The motion was overruled and after judgment for the plaintiff the defendant prosecuted error to the district court, where the judgment of the justice was affirmed. The defendant now prosecutes error to this court from the judgment of the district court. The sole question raised is the sufficiency under the circumstances above stated of the affidavit for a continuance.

Sections 959, 960, and 961 of the Code of Civil Procedure provide for adjournment of trials before justices of the peace. Section 959 provides for certain cases where the justice may adjourn the trial upon the return day without the consent of either party; and closes as follows: "If the trial be not adjourned it must take place immediately upon the return of the summons." Sections 960 and 961 are as follows:

"Sec. 960. The trial may be adjourned upon the application of either party, without the consent of the other, for a period not exceeding thirty days, as follows; the party asking the adjournment must, if required by his adversary, prove by his own oath, or otherwise, that he cannot, for want of material testimony which he expects to procure, safely proceed to trial.

"Sec. 961. An adjournment may be had at the return day, or at any subsequent time to which the cause may stand adjourned, on the application of either party, for a period longer than thirty days, but not to exceed ninety days from the time of the return of the summons, upon compliance with the provisions of the preceding section, and upon proof by the oath of the party, or otherwise, to the satisfaction of the justice, that such party cannot be

ready for trial before the time to which he desires an adjournment for the want of material evidence, describing it, that the delay has not been made necessary by any act or negligence on his part since the action was commenced, and that he expects to procure the evidence at the time stated by him."

In *Belcher v. Skinner*, 28 Neb., 91, and in *Coombs v. Brenklander*, 29 Neb., 586, it was held that an affidavit in the language of section 960 was sufficient to entitle a party to a continuance not exceeding thirty days, but in both cases the application was made on the day when the cause was first set for trial. In *Belcher v. Skinner* it is said that this latitude is allowed because the statute seems to regard thirty days as not an unreasonably short time to prepare for trial. In the case before us one adjournment had been had at the defendant's request, and the fact that the plaintiff consented is not material, because section 960 demands an affidavit only when required by the adverse party. Possibly, though this we do not decide, where the first adjournment is for less than thirty days, a further adjournment might be had under section 960 by general affidavit, provided the two adjournments together would not exceed thirty days; but section 961 plainly contemplates that in order to procure an adjournment extending more than thirty days from the return day the affidavit must be according to the requirement of that section. The affidavit here filed was insufficient to justify an adjournment extending beyond thirty days from the return day.

AFFIRMED.

UNION PACIFIC RAILWAY COMPANY V. METCALF & WOOD.

FILED JANUARY 19, 1897. No. 7007.

1. **Partnership: ACTIONS: DEATH OF PARTNER: ABATEMENT.** A petition set forth that the plaintiffs, A & B, were a firm composed of A and B, formed for the purpose of doing business in this state. The caption was in the firm name alone. The summons did not appear in the record. *Held*, That the action was not one brought under section 24 of the Code, authorizing partnerships to sue without setting forth the names of the partners, and that it did not abate on the death of one of the partners.
2. ———: ———: ———: ———. That the surviving partner was already a party to the action, and that on the death of the other partner the action could properly be continued in the name of the survivor alone.
3. **Carriers: FAILURE TO DELIVER CONSIGNMENT: PLEADING.** An action against a carrier for failure to deliver goods cannot be maintained by the consignor in the absence of averments that he was the owner of the goods, that he was liable for their loss, or that he had sustained special damage.

ERROR from the district court of York county. Tried below before BATES, J. *Reversed*.

The facts and issues are stated in the opinion.

John M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error:

The court erred in overruling the motion of defendant below, founded on its plea in the nature of abatement, that the action be dismissed. (*Burlington & M. R. R. Co. v. Dick*, 7 Neb., 242; *Lease v. Vance*, 28 Ia., 509; *Weisz v. Dacey*, 28 Neb., 566; *Hays v. Lanier*, 3 Blackf. [Ind.], 322; *Bentley v. Smith*, 3 Caines [N. Y.], 170; *Simmons v. Titcher*, 14 S. R. [Ala.], 786; *Leach v. Milburn*, 14 Neb., 106; *Burrows v. Bashford*, 22 Wis., 104; *Otis v. Thorn*, 18 Ala., 395; *Davis Avenue R. Co. v. Mallon*, 57 Ala., 168; *Dubbers v. Goux*, 51 Cal., 154; *Sheldon v. Hoy*, 11 How. P. [N. Y.], 11; *Merritt v. Seaman*, 6 N. Y., 168.)

The court erred in overruling the demurrer to the petition and the objection on the trial to any evidence being given by the plaintiff in the case, for the reason that the petition did not state facts sufficient to constitute a cause of action against defendant. (*Arzbacher v. Mayer*, 53 Wis., 384; *Stevens v. Nichols*, 130 U. S., 230; *Roberts v. Lovell*, 38 Wis., 211; *Nelson v. Swan*, 13 Johns. [N. Y.], 483.)

The petition affirmatively shows that the cause of action is in McCourtie, Hill & Co., named therein as consignee, and not in the plaintiff Metcalf & Wood. *Prima facie* the consignees are the owners and the right of action is in them, the legal presumption being that when goods are sent to a consignee, the title thereto vests in him as soon as they are shipped. (*Dawes v. Peck*, 8 Term R. [Eng.], 330; *Lawrence v. Minturn*, 17 How. [U. S.], 100; *Ogden v. Coddington*, 2 E. D. Smith [N. Y.], 317; *Tronson v. Dent*, 36 Eng. L. & Eq., 41; *Coleman v. Lambert*, 5 M. & W. [Eng.], 502; *Pennsylvania Co. v. Poor*, 103 Ind., 553; *Madison, I. & P. R. Co. v. Whitesel*, 11 Ind., 55; *Pennsylvania Co. v. Holderman*, 69 Ind., 18; *Ludlow v. Bowne*, 1 Johns. [N. Y.], 1; *Wiseman v. Vandeputt*, 2 Vern. [Eng.], 203; *Coxe v. Harden*, 4 East [Eng.], 211; *Dawes v. Peck*, 8 Term [Eng.], 330; *Coates v. Chaplin*, 2 G. & D. [Eng.], 552; *Dunlap v. Lambert*, 6 Clark & F. [Eng.], 600; *Hazleton v. Union Bank of Columbus*, 32 Wis., 34; *Roberts v. Lovell*, 38 Wis., 211; *Friddle v. Crane*, 68 Ind., 583; *Wilson v. Town of Monticello*, 85 Ind., 10; *Wier v. State*, 96 Ind., 311.)

There was nothing in the petition charging defendant, or showing it liable, as a common carrier, except on its own lines within the state. There is no evidence showing any loss or damage to the consignment while being transported within the state. Plaintiff should not recover. (*Gibbons v. Ogden*, 9 Wheat. [U. S.], 1; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S., 472; *State Freight Tax*, 15 Wall. [U. S.], 232; *Ward v. Maryland*, 12 Wall. [U. S.], 418; *Welton v. State of Missouri*, 91 U. S., 275; *Henderson v. Mayor of New York*, 92 U. S., 259; *Chi Lung v. Freeman*, 92 U. S., 275; *Hobart v. Drogan*, 10 Pet. [U. S.], 108; *United*

States v. New Bedford Bridge, 1 W. & M. [U. S.], 418; *Davis v. Duncan*, 17 Am. & Eng. R. Cas. [Miss.], 295.)

The limitations printed upon the face of the bill of lading, and the rules and regulations indorsed upon the back thereof, were in terms agreed to by both of the contracting parties, and were in all respects valid and binding. (*Swift v. Philadelphia & R. R. Co.*, 58 Fed. Rep., 858; *Welton v. State of Missouri*, 91 U. S., 282; *Brown v. Houston*, 114 U. S., 622.)

A common carrier may lawfully contract for indemnity from responsibility beyond its own lines as to freight shipped on its own road and from thence carried over another road than that of the carrier, but connecting therewith. (*Terre Haute & L. R. Co. v. Sherwood*, 31 N. E. Rep. [Ind.], 786; *Hallenbake v. Fish*, 8 Wend. [N. Y.], 547; *Russell v. Fagan*, 8 Atl. Rep. [Del.], 258; *Mason v. Thompson*, 9 Pick. [Mass.], 280; *Myrick v. Michigan C. R. Co.*, 107 U. S., 102; *Nutting v. Connecticut River R. Co.*, 1 Gray [Mass.], 502; *Burroughs v. Norwich & W. R. Co.*, 100 Mass., 26; *Case v. Dunmore*, 23 Pa. St., 93; *Butt v. Green*, 29 O. St., 667; *Shelly's Appeal*, 36 Pa. St., 373; *Spitley v. Frost*, 15 Fed. Rep., 299; *Weinberg v. Albemarle & R. R. Co.*, 91 N. Car., 31; *Boorman v. American Express Co.*, 21 Wis., 157; *Grace v. Adams*, 100 Mass., 505; *Illinois C. R. Co. v. Jonte*, 13 Brad. [Ill. App.], 424; *Muller v. Cincinnati, H. & D. R. Co.*, 2 Cinn. Sup. Ct. Rep. [O.], 280; *McCarn v. International & G. N. R. Co.*, 19 S. W. Rep. [Tex.], 547; *Atchison & N. R. Co. v. Washburn*, 5 Neb., 117; *Missouri P. R. Co. v. Vandercenter*, 26 Neb., 222; *Union P. R. Co. v. Marston*, 30 Neb., 241.)

F. C. Power, contra:

The action did not abate upon the death of the partner. (2 Bates, Partnership, sec. 725; *Cragin v. Gardner*, 31 N. W. Rep. [Mich.], 206; *Phoenix Ins. Co. v. Moog*, 1 So. Rep. [Ala.], 108.)

The carrier's liability is not restricted to its own line. (Compiled Statutes, ch. 16, sec. 111; *Atchison & N. R. Co.*

v. Washburn, 5 Neb., 117; *Missouri P. R. Co. v. Vandeventer*, 26 Neb., 222; *Union P. R. Co. v. Marston*, 30 Neb., 241; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb., 463; *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb., 356; *Murray v. Chicago & N. W. R. Co.*, 62 Fed. Rep., 24.)

IRVINE, C.

This was an action against the Union Pacific Railway Company for failure to convey and deliver certain goods consigned by Metcalf & Wood from York, Nebraska, to McCourtie, Hill & Co., at Chicago, Illinois. As several questions arise out of averments in the petition, we quote a portion thereof:

“METCALF & WOOD AND JAMES
H. WOOD, SURVIVING MEMBER
OF THE SAID FIRM, PLAINT-
IFFS.

v.

UNION PACIFIC RAILROAD COM-
PANY, DEFENDANT.

“Plaintiff for cause of action against the defendant alleges that this plaintiff, Metcalf & Wood, is a firm of persons composed of Lafayette Metcalf and James H. Wood, formed for the purpose of doing business in this state and not incorporated, and doing business in York, York county, Nebraska, in the name and style of Metcalf & Wood.

"2. Defendant is a corporation duly incorporated by act of congress of the United States.

"3. Said defendant, at the times thereafter mentioned, was and still is a common carrier of goods and chattels for hire from York, York county, Nebraska, to Chicago, in the state of Illinois.

"4. On or about the 1st day of December, 1891, the plaintiff delivered to the defendant one car load of flaxseed at York, Nebraska, containing one thousand bushels of flax, to be safely and securely conveyed by said defendant from said York, Nebraska, to said Chicago, in the

state of Illinois, and the defendant then and there undertook and agreed, for a certain reward to be paid by the plaintiff to the said defendant, to so safely and securely deliver the said flaxseed to McCourtie, Hill & Co., at the city of Chicago and state of Illinois.

"5. The said defendant did not safely convey and deliver the said flax as it had undertaken to do, but, on the contrary, conducted itself so negligently in and about carrying and transporting the same that on the line of the defendant's railroad between said York and Chicago five hundred bushels of said flaxseed, which was of the value of ninety-two cents per bushel, was wholly lost to the plaintiff, to the plaintiff's damage in the sum of \$460."

This was followed by a second count, in similar language, averring the shipment and failure to deliver of a car load of shelled corn. The verdict having been in favor of the defendant, which is here the complaining party, on the second count of the petition, it is unnecessary to set it out or further consider it. The defendant demurred to each cause of action. The demurrers were overruled, and the defendant then answered denying *seriatim* the averments of the petition, including the alleged partnership. Further, the defendant averred "that said flaxseed and corn * * * was delivered to and received by said defendant and placed in the cars of the defendant for McCourtie, Hill & Co. of Chicago, and that the same was safely conveyed and delivered to the said McCourtie, Hill & Co. in the city of Chicago, in the state of Illinois, without any negligence or want of care on the part of the defendant in respect thereto." In addition to this, it was alleged that the action was one arising under the constitution and laws of the United States, the goods being received in accordance with two certain bills of lading at York, Nebraska, to be carried to Council Bluffs, Iowa, the terminus of defendant's line, under the agreement that the responsibility of defendant as a common carrier should cease at Council Bluffs, and that said goods were forwarded therefrom over some other road

to Chicago. Finally, it was pleaded that if there was any such firm as Metcalf & Wood it had, since the commencement of the action, been dissolved by the death of Lafayette Metcalf, and that by reason thereof the action had abated. Thereafter the defendant moved the court for a judgment of dismissal on the plea in abatement. This motion was overruled and the plaintiff given leave to insert in the caption the words, now appearing therein, "and James H. Wood, surviving member of said firm." Thereupon the plaintiff filed a reply denying new matter in the answer, admitting the death of Lafayette Metcalf, and alleging that James H. Wood was the surviving member of the firm. The case was then tried, resulting in a verdict for the plaintiff on account of the flax. This judgment the defendant seeks to reverse, assigning fifty-four errors, most of which are more or less specifically argued in the briefs.

The first question presented relates to the action of the court in overruling the plea in abatement. The argument is founded upon the theory that the action is prosecuted under section 24 of the Code of Civil Procedure, whereby "Any company or association of persons formed for the purpose of carrying on any trade or business, or for the purpose of holding any species of property in this state, and not incorporated, may sue and be sued by such usual name as such company, partnership, or association may have assumed to itself or be known by, and it shall not be necessary in such case to set forth in the process or pleading, or to prove at the trial, the names of the persons composing such company." It is contended that when a suit is brought under this section it is an impersonal proceeding, the individual members of the firm are not, as such, parties thereto, and that when dissolution occurs the firm has no longer any legal existence, and that an action so brought therefore abates. We need not investigate this question, because the suit was not in fact brought under the section referred to. The opening paragraph of the petition describes the firm of Metcalf &

Wood as composed of Lafayette Metcalf and James H. Wood, and the caption, which originally contained merely the name of the firm, should not be permitted to control this specific averment, which was undoubtedly traversable and constituted the individual members parties plaintiff. We do not know how the summons issued, but the pleadings, in the language of section 24 of the Code, set forth the names of the persons composing the company, and the action must be treated as if brought regardless of that section. We have quite recently held, following well established principles, that on the death of a partner the assets and choses in action of the partnership vest in the survivor. (*Lindner v. Adams County Bank*, 49 Neb., 735.) It is, therefore, the surviving partner who has in such case a right to proceed with the action. He was already a party, and the orderly course, perhaps, would have been to suggest the death of the other partner and to procure an order permitting the action to proceed in the name of the survivor alone. But the death of Metcalf was suggested in this case by both answer and reply. Wood was already a party and there was no error in permitting his name to be added in the caption of the petition. The judgment was rendered in favor of Wood alone, so that while the proceedings were not strictly regular, they were without prejudice to the defendant.

It is next argued that the court erred in overruling the objection of the defendant to the introduction of any evidence, on the ground that the petition did not state a cause of action. It will be observed that the petition contained no averment that the plaintiffs were the owners of the goods shipped, nor did it contain any averment of facts showing that the plaintiffs were in any manner liable for their loss. On the other hand, it affirmatively averred that the goods were to be safely conveyed and delivered to McCourtie, Hill & Co. in Chicago. It is claimed that it was thus affirmatively shown that the cause of action was in McCourtie, Hill & Co., and not in

the plaintiff. This raises a question on which the authorities present a most embarrassing conflict. To review them *in extenso* would be tedious and not very profitable. A few English cases seem, according to the varying opinions of different courts and judges, to have formed bases for the different views expressed in this country. In *Davis v. James*, 5 Burr. [Eng.], 2680, Lord Mansfield sustained an action by the consignor upon the theory that wherever the property lay, the contract was between the consignor and the carrier, and that the consignor was bound to pay the freight. In *Joseph v. Knox*, 3 Camp. [Eng.], 320, Lord Ellenborough sustained a similar action on the same ground of privity of contract, and because the consideration moved from the consignor. However, in *Daves v. Peck*, 8 T. R. [Eng.], 330, the prior cases were distinguished upon the ground that a special contract had been established, and the king's bench held unanimously that the right of action must depend upon the ownership of the goods; that they became the property of the consignee on delivery to the carrier. Therefore, the right of action was in the consignee, and not the consignor. These and many other cases were reviewed by the house of lords in *Dunlop v. Lambert*, 6 C. & F. [Eng.], 600, and the conclusion reached that generally the consignee is the proper person to sue. Yet this rule may be varied by circumstances, among them the fact of a special contract between the consignor and the carrier. As before remarked, these different views are reflected throughout the decisions of American courts, and in the absence of uniform direct authority we might be free to adopt whatever view seemed to us best founded on principle. We have, however, in our own law a few landmarks by which we must to a certain extent be guided. In the first place, the constitution provides that "the liability of railroad corporations as common carriers shall never be limited" (Constitution, art. 11, sec. 4), and it has been held that by special contract a railroad company may not limit its liability as a carrier. (*Atchison & N. R. Co. v. Washburn*,

5 Neb., 117; *Missouri P. R. Co. v. Vandeventer*, 26 Neb., 222; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb., 463; *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb., 356.) It would seem to result from this doctrine that the liability of carriers must be measured according to the common-law rule, without regard to special contracts, and that this rule should operate in favor of both parties. Next, it has been held that a bill of lading is a symbol of property, and one properly indorsed operates as a delivery of the property, so that delivery must be made to the lawful holder of the bill of lading in order to discharge the carrier; and this was held in an action by such lawful indorsee of the bill of lading against a carrier who had delivered the goods to another. (*Union P. R. Co. v. Johnson*, 45 Neb., 57.) It would seem to follow from this that by issuing its bill of lading a carrier becomes responsible for the delivery of goods to the consignee or his assignee, the duty following the bill of lading and not remaining in favor simply of the consignor. (See, also, *Union Stock Yards Co. v. Westcott*, 47 Neb., 300.) Again, it has been held that the refusal of a carrier to surrender goods to the rightful owner amounts to a conversion, and to surrender to the rightful owner is a good defense to an action by the consignee. (*Shellenberg v. Fremont, E. & M. V. R. Co.*, 45 Neb., 487.) We think it may be safely said, then, that the law of this state establishes these propositions: That the rights and liabilities of carriers must be determined according to the rules of the common law, without regard to special contracts of shipment, and that the carrier on receiving goods receives them for the owner, presumably the consignee, or his assignee, but the real owner, whoever he may be; that the consignee may sue and recover merely on proof that he is the consignee; that the indorsee of the bill of lading may sue on the production of the bill of lading, properly indorsed to him; that the real owner may sue. We think it would be an intolerable hardship on the carrier to hold also that an action would lie by the consignor merely because he is

the consignor, without any averment that he is the owner, that he is liable for the goods, or that he has sustained special damage. The cases holding that in the absence of such averments the consignor may sue are not, as we believe, in accordance with the principles of law established in this state. As already seen, Lord Mansfield, in *Davis v. James*, *supra*, based the right on the fact that the consignor was to pay the freight, and that the contract for carriage was with him. This principle was more clearly stated by Lord Ellenborough in *Joseph v. Knox*, *supra*, recovery being placed on the ground that the consideration moved from the consignor, to whom the promise was made. But it is well settled here that a third person for whose benefit a promise is made, although not a party to the consideration, may sue thereon. (*Shamp v. Meyer*, 20 Neb., 223; *Keedle v. Flack*, 27 Neb., 836; *Fonner v. Smith*, 31 Neb., 107; *Kaufman v. United States Nat. Bank*, 31 Neb., 661; *Hale v. Ripp*, 32 Neb., 259; *Sample v. Hale*, 34 Neb., 220; *Lyman v. City of Lincoln*, 38 Neb., 794; *Doll v. Crume*, 41 Neb., 655; *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb., 44; *Hare v. Murphy*, 45 Neb., 809.) Prior to the establishment of this rule all benefits from the express contract of carriage would be lost unless the consignor himself might sue. But the establishment of the modern principle undermines the whole reasoning on which the decisions of Lord Mansfield and Lord Ellenborough were based. The American cases taking a similar view are based largely on the learned opinion of Chief Justice Shaw in *Blanchard v. Page*, 8 Gray [Mass.], 281. An inspection of that case will show that it is founded on the same obsolete reasons. All the cases hold that the presumption is that the consignee is the owner, and all the cases holding that the consignor may sue are based, so far as we can ascertain, on one of three grounds: First, that it was made to appear by pleadings and proof that the consignor was the owner; or second, that the consignor was liable to the consignee or suffered special damage; or third, cases based solely on the doctrine of

privity of contract, which, we think we have demonstrated, does not apply in this state. Our Code requires all actions to be brought by the real party in interest, except in certain cases specified. (Code of Civil Procedure, secs. 29, 32.) The only exception which could possibly be applicable to this case is that one "with whom or in whose name a contract is made for the benefit of another" may bring the action without joining the beneficiary. In Missouri it has been held, under a similar provision, that the consignor falls within this exception, and may maintain the action for the benefit of the owner. But this case was based solely on former adjudications of that court wherein it had been held that assignees of choses in action for the purpose of collection only might sue in their own names. *Hoagland v. Van Etten*, 22 Neb., 681, is contrary to that rule. We cannot see how the consignor can be conceived to be the trustee of an express trust. He may, strictly speaking, be a person with whom a contract is made for the benefit of the consignee. But this is true in every case where a promise is made for the benefit of a third person. Our law permits the third person to sue. Could a judgment in favor of the promisee be pleaded in bar of an action by the real party in interest? We think not. Under the allegations of this petition, ownership not being averred in the plaintiffs, and a consignment to McCourtie, Hill & Co. being pleaded, the presumption is that McCourtie, Hill & Co. were the owners. The defendant was bound to deliver to them. They or their indorsees could maintain an action. Delivery to the true owner was necessary to discharge the carrier from liability. Should McCourtie, Hill & Co. sue the carrier, it would be no defense to plead a former recovery by the consignor, unless such consignor was the owner. The objection to the evidence should have been sustained.

REVERSED AND REMANDED.

ROSS GAMBLE V. A. STAUBER MANUFACTURING COMPANY.

FILED JANUARY 19, 1897. No. 7024.

Custom and Usage: KNOWLEDGE: CONTRACTS. The business usage of a particular individual is not admissible to interpret a contract between that individual and another in the absence of proof of knowledge by the other of such usage. *Union Stock Yards Co. v. Westcott*, 47 Neb., 300, followed.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J. *Reversed.*

Calkins & Pratt, for plaintiff in error.

Marston & Nevius, contra.

IRVINE, C.

This was an action in replevin by the A. Stauber Manufacturing Company against Ross Gamble to recover goods described as "200 pairs of men's and boys' pants." The plaintiff had judgment for a portion of the goods, and the defendant brings the case here by proceedings in error.

It appears that one A. Sands was, in 1891, in business in Kearney. On the 13th of October in that year he wrote the plaintiff as follows:

"A. Stauber Mfg. Co.—GENTS: Yours of the 12th to hand. You can send a sample line of your cashmere pants, price \$2 to \$4, and if prices and goods are satisfactory I will send you order.

"Yours resp.,

A. SANDS."

Thereupon a quantity of the articles which the parties see fit to designate "pants" was shipped by the plaintiff to Sands, and on October 16 the plaintiff mailed to Sands an invoice headed as follows:

Gamble v. Stauber Mfg. Co.

"A. STAUBER MFG. CO.,

"Manufacturer of Warranted Pants, 1004, 1006, 1008
Fourth Street,

"CLINTON, IOWA, Oct. 16, 1891.

"Sold to Mr. A. Sands, Kearney, Neb.

"Payable in Chicago or New York exchange.

"Dec. 1, 6-10. 5-30."

Below this was a list of the goods shipped with prices, and across the face was printed the following: "If this bill is not correct in all respects, please notify us at once, as no allowance will be made at time of settlement." This was followed October 21 by a written order from Sands for a quantity of goods of the same character. These goods were shipped October 24, and invoiced in precisely the same form as the first shipment. The goods, in some way not disclosed, found their way into the possession of Mr. Gamble, from whom the plaintiff undertook to replevy both orders. The court instructed the jury that the second transaction was a sale to Sands and that as to the goods embraced in the second order the plaintiff could not recover.

The sole issue presented to the jury was whether the first transaction was a shipment of samples for inspection and return by Mr. Sands, or whether it was a sale. The plaintiff's letter of October 12, referred to in Sands' letter of the 13th, was not produced and there is no evidence as to its character. It will be at once observed that according to circumstances the first transaction may have been either a shipment of samples for inspection or a sale. Mr. Sands' letter of October 13 apparently contemplates a shipment to him of samples for inspection, but, if instead of complying with the directions of that letter the plaintiff shipped goods under such circumstances as to imply an intention to make an absolute sale and Sands received the goods and detained them, there can be no doubt that the plaintiff might have recovered as for a sale on a *quantum meruit*. Therefore it would be a sale and replevin would not lie. No document in evidence constitutes a complete written contract. The letter as

remarked plainly implies an order of samples for inspection. The invoice, on the other hand, as strongly implies a sale. Only one witness was called—the secretary of the plaintiff company. He was permitted to testify, over the objections of the plaintiff, as follows:

Q. When such an order as this of the 13th of October, 1891, which has been introduced in evidence here, is received by this house asking for samples, what is the rule of the house, or your practice, with reference to those orders?

A. It is customary to send such goods out on memorandum, as nearly all houses do.

This was followed by an explanation that by memorandum was meant such a bill as accompanied these goods. In admitting this evidence we think the court erred. It was not sought to show a custom, or even a trade usage, either general or local, in its character. The evidence was merely as to the usage of one business concern, the plaintiff in the case. It was not shown that Sands had any notice of such usage, nor was any offer made to show that fact. Even in the case of a local custom, such knowledge must be brought home to the individual sought to be charged in order to render the custom available. (*Milwaukee & Wyoming Investment Co. v. Johnston*, 35 Neb., 554; *Union Stock Yards Co. v. Westcott*, 47 Neb., 300.) With regard to customs they may be so well established and so general that the parties are presumed to contract with reference thereto, but with regard to the usage of an individual, actual knowledge must be proved. (*Union Stock Yards Co. v. Westcott*, *supra*.) There was very little evidence in the case beyond what has already been detailed,—none in fact throwing any important light on the transaction. The documents from their terms leaving the transaction uncertain, the evidence referred to probably had serious weight with the jury. Its admission was certainly prejudicial, and its effect was not controlled in any way by the instructions.

REVERSED AND REMANDED.

PATRICK MULLEN V. LOUISA KINSEY.

FILED FEBRUARY 3, 1897. No. 7018.

1. **Vendor and Vendee: FRAUD.** A purchaser of real estate has a right to rely upon the representations of his vendor touching the quality and location of the property, and the character of the improvements thereon, whenever the facts concerning which such representations are made are not within the knowledge of the purchaser.
2. ———: ———. Evidence examined, and *held* to sustain the judgment for damage on account of fraudulent representations by the vendor touching the character and value of improvements upon the lands conveyed.

ERROR from the district court of Douglas county.
Tried below before HOPEWELL, J. *Affirmed.*

Charles B. Keller, for plaintiff in error.

Warren Switzler, *contra.*

POST, C. J.

This was an action below in the district court for Douglas county by the defendant in error, Louisa Kinsey, against the plaintiff in error, Patrick Mullen, to recover damage on account of certain alleged false and fraudulent representations of the latter as an inducement to the purchase by the former of a certain quarter section of land in Holt county. The fraud charged consists in the false statement relied upon by the plaintiff below, that there were situated upon the Holt county land a frame dwelling house 20 by 40 feet, with a stone foundation, of the value of \$600, and a barn 20 by 30 feet, of the value of \$200; a frame granary 10 by 20 feet, of the value of \$200, together with good fences, outhouses, etc.; also that 65 acres of said land was under cultivation, in addition to which there was, as represented, situated thereon an orchard of 5 acres. The material allegations of the petition were all put in issue by the answer

and a trial had resulted in a verdict for the plaintiff below in the sum of \$250, upon which judgment was subsequently entered and which it is sought to reverse by means of this proceeding.

The question to which our attention is especially directed by counsel for the plaintiff in error is that of the sufficiency of the evidence to sustain the judgment. In this connection it is contended that the defendant in error did not rely upon the alleged representations respecting the land in question, but upon an independent investigation made under her direction; and in support of that proposition we are referred to the fact that one Green, defendant in error's agent, pending the negotiation which resulted in the contract, at the instance of the latter, wrote to Holt county for information respecting said land. But the inquiry made appears to have been confined to the character of the land only, and a reason was given, satisfactory to the jury, for the reliance by the defendant in error upon the representations of the adverse party touching the value of the land and the improvements thereon. It is also argued that the representations, as proved, related to the value of the property only and that they are accordingly not actionable, even conceding them to have been false; but there is evidence clearly tending to prove the plaintiff's charges and which for the purpose of this investigation is quite sufficient to sustain the judgment complained of. A purchaser of real estate has a right to rely upon the representations of his vendor touching the quality and location of the property and the character of the improvements thereon whenever the facts concerning which such representations are made are not within the knowledge of the vendee. (*Hock v. Bowman*, 42 Neb., 80, and authorities cited.)

Exception was taken to the admission in evidence of a sworn statement or application for a loan made by one Price, plaintiff in error's grantor, in which the representations respecting improvements correspond to the alle-

gations of the petition below. We think a sufficient foundation had been laid for the introduction of the evidence complained of. The negotiations which resulted in the conveyance by the plaintiff in error of the Holt county land in exchange for certain property in the city of Omaha were conducted on the part of the latter by one Spencer, and who, as an inducement to such exchange, submitted to defendant in error the statement aforesaid as evidence of the character and value of the improvements upon the premises of his principal. It is evident from the record that Spencer, in the transaction mentioned, was acting within the scope of his authority as plaintiff in error's agent in effecting the desired exchange of property and that the ruling assigned is free from error.

It is next assigned that the district court erred in permitting one Saunders, a witness for defendant in error, to testify to the value of the Holt county property and also the improvements thereon at the time of the transaction here involved, to-wit, in the month of July, 1889. The objection that no foundation had been laid for such testimony is clearly without merit. The witness had, according to his own statement, bought and sold real estate in Holt county, and was acquainted with the market value of lands in that vicinity at the time in question.

Error is also alleged in the giving and refusing of instructions. But the questions thus presented, so far as they are material to the controversy, have been noticed in connection with the other assignments.

There is no error in the record and the judgment will be

AFFIRMED.

H. WALLACHS & SONS ET AL. V. ROBINSON & STOKES COMPANY ET AL.

FILED FEBRUARY 3, 1897. No. 7039.

1. **Insolvent Corporations: PREFERRING CREDITORS.** An insolvent corporation may, in the absence of actual fraud, prefer one or more of its creditors to the exclusion of others.
2. ———: **FRAUDULENT CONVEYANCES.** Whether or not a conveyance by an insolvent corporation is fraudulent as to creditors cannot be determined as a question of law, but is a question of fact, to be determined from a consideration of the evidence in each particular case. (*Shaw v. Robinson*, 50 Neb., 403.)

ERROR from the district court of Douglas county.
Tried below before FERGUSON, J. *Affirmed.*

Rich, O'Neill & Sears, for plaintiffs in error.

Montgomery & Hall, *contra.*

POST, C. J.

This is a petition in error by H. Wallachs & Sons, Barnheimer & Walker, Converse, Stanton & Cullen, Rothchilds & Co., James Talcott, and Robinson & Shackleton, who were intervenors in the district court for Douglas county in an action in which the Robinson & Stokes Company was plaintiff, and the Commercial National Bank, Anastatia Burnette, and George A. Bennett, sheriff, were defendants. The controlling question presented is that of the right of an insolvent corporation, in the absence of actual fraud, to prefer one or more of its creditors to the exclusion of others, and which was, by the order sustaining the demurrer of the Commercial National Bank to the petition of intervention, resolved in the affirmative. The precise question here involved was considered in *Shaw v. Robinson*, 50 Neb., 403, in which it was held that the question of fraud is in all such cases one of fact to be determined from a consideration of all of the evidence

Branch v. United States Nat. Bank.

adduced. We are satisfied with the reasoning of Mr. Commissioner RYAN in the case cited, as well as the conclusion there reached. It follows that the judgment of the district court is right and must be

AFFIRMED.

NORVAL, J.

I concur on the ground that the question was settled in the case cited in the opinion.

CHARLES W. BRANCH, APPELLEE, v. UNITED STATES
NATIONAL BANK OF OMAHA, APPELLANT, ET AL.

FILED FEBRUARY 3, 1897. No. 6939.

1. **Commercial Paper: INDORSEMENT: TITLE.** The legal title of commercial paper indorsed "for collection" passes to the indorsee only so far as to enable him to demand and enforce payment thereof.
2. ———: ———: ———: **BANKS AND BANKING.** The owner of paper so indorsed may control the same until paid in full, and may intercept the proceeds thereof in the hands of an intermediate agent.
3. **Banks and Banking: COLLECTIONS.** The mere crediting of the account of the remitting bank by a correspondent employed by it to make collections does not create in favor of the latter such an equity as can be interposed in defense of an action by the owner of the paper so collected for the proceeds thereof.
4. ———: ———: **PROCEEDS.** Evidence examined, and *held* insufficient to prove that the position of appellant, a sub-agent for the collection of commercial paper, has been altered to its damage through the placing of the proceeds of such paper to the credit of the bank from which it was received.

APPEAL from the district court of Lancaster county.
Heard below before STRODE, J. *Affirmed.*

Cowin & McHugh, for appellant.

John S. Bishop, *contra*.

POST, C. J.

This was an equitable proceeding in the district court for Lancaster county, whereby the appellee, Charles W. Branch, seeks to recover the sum of \$941.34 and interest, being the proceeds of a check drawn to his order by the Hamilton Brown Shoe Company upon the Continental National Bank of St. Louis, under date of January 11, 1893. A final decree was by the district court rendered against the appellant, the United States National Bank of Omaha, in accordance with the prayer of the petition, and dismissing the action as against the defendant Hayden, receiver of the Capital National Bank. The issues presented by the pleading are fairly indicated by the findings of the district court, viz.:

"That on the 13th day of January, 1893, at Lincoln, Nebraska, the plaintiff indorsed said check and delivered it to the defendant, the Capital National Bank of Lincoln, for collection, and that the said Capital National Bank received the same for collection as the agent of the plaintiff, without paying any consideration therefor, and stamped its collection number 15227 on the face of said check, and entered the same on its collection register as the collection of plaintiff; that on the 14th day of January, 1893, the defendant, the Capital National Bank, indorsed said check to the order of M. T. Barlow, cashier of the United States National Bank of Omaha, Nebraska, for collection, and forwarded the same by mail to the said United States National Bank at Omaha, Nebraska, as the property and collection of this plaintiff; that the defendant, the United States National Bank, received said check for collection, without paying any consideration therefor, on the 16th day of January, 1893, and that said United States National Bank had notice, by the collection number of the Capital National Bank thereon and the letter of the said Capital National Bank forwarding the same, that the Capital National Bank was not the owner of the said check, but was agent of the plaintiff for

the collection thereof; that on the 20th day of January, 1893, the defendant, the United States National Bank, collected the full amount of said check, to-wit, the sum of nine hundred forty-one and 34-100ths dollars, and that the said defendant, the United States National Bank, has not paid the amount it received on said check, but still has the same in its possession.

"The court further finds that the defendant, the Capital National Bank, acted as the agent of the plaintiff in making this collection and in forwarding the same to the defendant, the United States National Bank, and that said defendant, the Capital National Bank, never received the proceeds of said check.

"The court further finds that the defendant Kent K. Hayden, as the receiver of the said Capital National Bank, never received the proceeds of said check.

"The court further finds that the plaintiff, before the commencement of this action, demanded from the defendant, the United States National Bank, payment of the amount received by it as the proceeds of said check, and that said demand was refused.

"The court further finds that the plaintiff is not indebted to the defendant, the Capital National Bank, and was not a depositor therein, and that on January 20, 1893, said Capital National Bank was insolvent and that its doors were closed on January 21, 1893, and that on the morning of January 23, 1893, said bank passed into the hands of an United States bank examiner and afterwards into the hands of a receiver."

In addition to the facts as above found it appears that the check in question was by the plaintiff indorsed in blank at the time of its delivery to the Capital National Bank for collection; that said check when received by the United States National Bank bore upon its face the following indorsement: "Report by this No. 15227. Capital National Bank," and was indorsed on its back as follows: "Collect for account of Capital National Bank, Lincoln, Nebraska." Accompanying the check was the following letter:

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"LINCOLN, Jan. 14, 1893.

"*U. S. National Bank, Omaha, Neb.*: We enclose for collection and cr' number 15227 St. Louis, Mo. No Protest \$941.34. Please report by our number. Do not carry collections past maturity.

R. C. OUTCALT,

"*Cashier.*"

The foregoing was by the correspondent bank acknowledged as follows:

"OMAHA, 1-20-93.

"*Cap. Nat. Bank, Lincoln*: Your favor of the — inst. is received, with stated enclosures. We credit * * * No. 15227, \$941.34. We credit out of town items subject to payment.

M. T. BARLOW,

"*Cashier.*"

The Capital National Bank was on January 20, and for a considerable time previous thereto, insolvent, and at the close of business on January 21 was placed in the hands of a bank examiner by order of the comptroller of currency. There had been, for several years previous to the transaction here involved, continuous dealings between said banks. As a matter of convenience, and in accordance with the usage of corresponding banks, the proceeds of commercial paper transmitted by the Capital National Bank for collection were by the United States National credited to the account of the former, and paid on its order or transferred to other banks, as the condition of the account might demand. The books of the United States National show an overdraft by the Capital National on January 16, when the check in controversy was received from the latter, of \$18,230.43. At the opening of business on January 20 the account of the Capital National was overdrawn to the amount of \$2,325.93, and during said day there was paid upon its orders by the United States National the sum of \$11,454.02, and on said day it was credited with the sum of \$11,800.97, including the proceeds of the check in controversy, leaving an overdraft, as shown by the books of the latter at the close of

business, of \$1,978.98, and which at the close of business on the 21st had been reduced to \$291.85. The letter of advice above set out under date of January 20 was received by the examiner in charge of the Capital National subsequent to the impounding thereof, and the credit in said letter mentioned does not appear upon the books of said bank in the hands of the receiver.

The first inquiry suggested by the record and arguments is the effect of the indorsement by the Capital National Bank of the check in question. It is true that the indorsement in blank by the plaintiff invested the indorsee, the Capital National Bank, with apparent general ownership of said instrument. The subsequent qualified indorsement by that bank, however, to the United States National Bank raises no presumption of ownership by the latter. Such a form of indorsement is not intended to give currency to commercial paper, but, on the contrary, operates to prevent further circulation, and passes to the indorsee such a title only as will enable him to demand payment and enforce collection of paper thus transferred. And the owner may in such case control the collection of his paper and may intercept the proceeds thereof in the hands of an intermediate agent. (*Dickerson v. Wason*, 47 N. Y., 439; *Freeman's Nat. Bank v. National Tube Works Co.*, 151 Mass., 413; *Boykin v. Bank of Fayetteville*, 24 S. E. Rep. [N. Car.], 357; *Clafflin v. Wilson*, 51 Ia., 15; *Commercial Bank v. Armstrong*, 148 U. S., 50; *Evansville Bank v. German-American Bank*, 155 U. S., 556.)

This conclusion leads to the subject of discussion to which most prominence is given in the arguments of counsel, viz., whether the crediting to the Capital National by the United States National on January 20 of the proceeds of the check in question amounts to a payment thereof which can be successfully interposed as a defense to this action. It is contended by appellant that the decisive question is not that of its title under the restricted indorsement, but whether, in view of the plaintiff's unrestricted indorsement of the check, it was authorized to

treat the Capital National Bank as the owner thereof. It is, in effect, contended that the plaintiff, in forwarding the check for collection through the Capital National Bank, by implication consented to the agencies usually employed for that purpose, and that he should, in view of the custom of banks in making collections, be held to have authorized the mingling of the proceeds of this check with the funds of the collecting bank, and settlement therefor by crediting the account of the bank to which the money should otherwise have been remitted. The soundness of that proposition as a general statement of the rule may, for the purpose of this case, be conceded, although it can, for reasons hereafter stated, have no application to the facts of the case before us. No mere book-keeping between a bank and its sub-agent for the collection of money can change the actual status of the parties, or destroy rights which arise out of the real facts of the transaction. (*Commercial Bank v. Armstrong, supra.*) In no case cited, and in none examined by us, has the mere crediting of the remitting bank by a correspondent employed by it to make collections been held to create in favor of the latter such an equity as can be successfully interposed as a defense to an action by the owner for the proceeds thereof. The transaction must in such case, as all agree, in order to work an estoppel, amount to a payment in good faith to the transmitting bank of money realized upon collections by the means usually employed by banks in effecting exchange.

The statement renders necessary a brief reference to the evidence in the record. We have seen that the United States National Bank received the proceeds of the plaintiff's check on January 20, that it paid out on said day, upon orders of the Capital National Bank, \$11,454.02, and credited the account of the latter \$10,859.63 in addition to the \$941.34 now in controversy. The cashier of the United States National, Mr. Barlow, testifies that the sum of \$11,454.02, above mentioned, was advanced by him as such cashier, in reliance upon the cash items, in-

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cluding the money in controversy, on that day received from, and on account of, the Capital National. But the condition of the account at the time of the receipt of the plaintiff's money and the amount subsequently paid out on that day upon orders of the Capital National, as compared with the remittances of the latter, do not appear, while the cash items received by the appellant bank on the 21st exceed the amount paid out on that day on the orders of the Capital National by \$1,687.13. It cannot, therefore, we think, be said that the position of the appellant has been altered to its damage through the crediting of the Capital National of the money received in payment of plaintiff's check. The defense here relied upon is essentially an equitable one, as to which the burden is upon the appellant, and we are, upon the whole record, satisfied that the finding of the district court is right and that its decree should be

AFFIRMED.

BEN B. WOOD V. MAX L. ROEDER.

FILED FEBRUARY 3, 1897. No. 6867.

1. **Fraud in Misrepresenting Foreign Law.** As a general rule, a misrepresentation which embodies matter of law is one upon which a party cannot rely, as all parties are presumed or bound to know the law; but where it is as to the law of another state, or its effect, it is not within the rule and may be fraudulent; and ignorance of the law may be pleaded by the one to whom the misrepresentation is made.
2. ———: **SALE OF COUNTY WARRANTS.** Where a warrant issued by a county of one state is purchased in another state in reliance upon a misrepresentation in respect to the statute of limitations as applicable to the warrant, and on presentation and demand payment of the warrant is refused on the ground that it is not a claim which can be enforced, there arises a cause of action in favor of the purchaser and against the party who sold the warrant and made the misrepresentation.
3. ———: ———. The evidence *held* sufficient to sustain the verdict rendered.

ERROR from the district court of Douglas county.
Tried below before KEYSOR, J. *Affirmed.*

George E. Pritchett, for plaintiff in error.

Winfield S. Strawn, *contra.*

HARRISON, J.

The defendant in error instituted this action in the district court of Douglas county to recover of plaintiff in error, alleging in substance in his petition that in the course of certain business transactions had with the plaintiff on or about October 6, 1887, he purchased a county warrant, or order, purported to have been issued by the proper officers of Lake county, Colorado, in the express sum of \$454.01 and interest thereon at ten per centum per annum from August 18, 1880, the date of its presentation for payment to the county treasurer, and its nonpayment for want of funds; that the defendant in error gave for the warrant its face value at the time of his purchase, viz., \$778.80; that to induce the purchase of said warrant the plaintiff in error "falsely and fraudulently represented to the plaintiff that said warrant was the existing legal and binding obligation of the said Lake county, in the state of Colorado; and, referring to the value of the said warrant, also verbally stated that the said warrant was good and would certainly be paid in full by the county issuing the same, only that said county was a little slow; that as plaintiff was necessarily making some investments, the said warrant would be a good and safe investment for the plaintiff.

"(3.) That having no other knowledge of said warrant than that derived from defendant's said representations, and confiding in and wholly relying on the correctness thereof and believing the same to be true, plaintiff took the said warrant of said defendant and gave as consideration therefor the sum of \$778.80, which then and there passed from plaintiff to defendant.

"(4.) That said warrant was not a legal existing and binding obligation of the said Lake county; that the said warrant was not good and would not then, or for a long time prior thereto, be paid by the said county, and was not a safe investment; but was then and for a long time prior thereto had been fully barred by the statute of limitations of the state of Colorado, and the obligation of said county to pay the same repudiated on that account, and that payment of the said warrant had been refused—all of which the defendant at the time of making such false representations well knew."

In the answer the plaintiff in error admitted the ownership of the warrant as stated in the petition, and alleged that the defendant in error, as agent for a life insurance company, solicited the plaintiff in error to insure his life with such company, which plaintiff in error did on condition that the company would accept the said county warrant as a part of the consideration for the insurance, and that the company, by its agent, the defendant in error, acceded to the condition and received the warrant and \$190.94 in cash, and issued to plaintiff in error a policy of life insurance; and further:

"That some time after said bargain or trade had been consummated and executed, the plaintiff tendered back to this defendant said warrant and demanded the face value thereof and interest of this defendant, in cash, with which demand this defendant refused to comply, but proposed to the plaintiff that if said company, his principal, or himself, was dissatisfied with the trade, said warrant and money should be returned to him, and he would deliver up said policy of insurance, and that such proposition was rejected by the plaintiff.

"And further answering said substituted petition this defendant denies the same and each and every allegation thereof, except as hereinbefore admitted."

In the reply it was admitted that the warrant was received by the defendant in error as a portion of the premium on a policy of insurance issued to plaintiff in error

by the National Insurance Company of Montpelier, Vermont, and that the balance of the premium was paid in cash, and it was alleged that the company had nothing to do with the part of the transaction which involved the warrant, that being a matter of trade between plaintiff and defendant in error personally, and known to plaintiff in error to be so; that there was a refusal to accept a return of the policy and to give up the warrant and cash therefor received, for the reason that at the date of the offer the policy had been in force two years, of which plaintiff in error had received the benefit. After the trial the defendant in error, on leave granted so to do, amended the second paragraph of the petition to conform to the proof, by adding thereto the following: "And verbally guaranteed that said warrant was good, and would be paid by the county issuing it, and that defendant agreed he would make it good." There was a trial of the issues to a jury and verdict and judgment for defendant in error. The case is presented here for review.

It is insisted that the evidence was insufficient to sustain the verdict. The evidence establishes that at the time of the transactions between the parties out of which the cause of action arose, any action on the warrant for the recovery of its amount was barred by the statute of limitations of Colorado, where it was executed. The evidence, although conflicting, was sufficient to support findings that such representations were made as were alleged in the petition and for the purpose therein stated, that the defendant in error relied on them, and that he, and not the insurance company, purchased the warrant. As a general rule, a misrepresentation which involves a statement of matters of law is one upon which a party cannot rely, as all parties are bound to know the law. (*Burt v. Bowles*, 69 Ind., 1; *Upton v. Tribilcock*, 91 U. S., 45.) But this is not a universal rule and has its exceptions. (*Bigelow*, *Fraud*, p. 9.) A misrepresentation which includes the opinion of a law of another state is without the rule, and may be fraudulent; and ignorance of the law may be

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pleaded by the party to whom the misrepresentations were made. (*King v. Doolittle*, 1 Head [Tenn.], 77.) The statement made by plaintiff in error was one of fact and law. It embraced the element of the operation of the law of Colorado in regard to the limitation of actions on the remedy for nonpayment of the warrant, the subject-matter of the contract between the parties; and whether or not he was possessed of knowledge, the effect was the same. It was not necessary to either plead or prove *scienter*. It was proven that the defendant in error, after he became possessed of the warrant, presented or caused it to be presented for payment, which was refused. This, being true, gave him a right of action to recover what he had paid for the warrant. It had proved to be without value,—was worthless. It was not an existing binding obligation of Lake county, Colorado, at the time of the sale to defendant in error, but was then barred by the statute of limitations; hence the right to this action accrued. (*Brown v. Rice*, 26 Gratt. [Va.], 467.) There was sufficient evidence to support findings of all the elements of an action such as this and which must be present to warrant a verdict, hence the verdict must be allowed to stand.

The points raised and presented by exceptions to certain designated instructions did not differ materially from those we have hereinbefore noticed and discussed, and what has been said is equally forcible to these as to the ones discussed, from which it follows that the objections to the instructions must be overruled. The judgment of the district court is

AFFIRMED.

In re McVey.

IN RE WILLIAM McVEY.

FILED FEBRUARY 3, 1897. No. 8999.

1. **Burglary: TIME COMMITTED.** That the act be committed in the night-time is an essential element of the crime of burglary.
2. ———: **INFORMATION: HOUSEBREAKING.** Under an information against a person for the crime of burglary, he cannot be convicted of the statutory offense of breaking and entering buildings in the daytime described in section 53 of the Criminal Code.
3. **Criminal Law: SENTENCE.** Jurisdiction to pronounce a particular sentence imposed is as essential as jurisdiction of the person and subject-matter. If the first does not exist the sentence is void.

ORIGINAL application for writ of *habeas corpus*. *Petitioner discharged.*

W. S. Shoemaker, for petitioner.

HARRISON, J.

In this, an application for a writ of *habeas corpus* on behalf of William McVey, who, it is pleaded in the petition, is unlawfully imprisoned and restrained of his liberty by John McDonald, sheriff of Douglas county, it appears that the applicant was arrested, informed against, and tried in the district court of Douglas county on a charge of the crime of burglary. The jury returned the following verdict: "We, the jury duly impaneled and sworn to try the case of the state of Nebraska against William McVey, do find the said defendant not guilty of the crime of burglary as charged, but do find him guilty of the crime of breaking and entering in the daytime with intent to steal property of value." Counsel for defendant moved his discharge, but this was overruled and the prisoner sentenced to imprisonment in the penitentiary for a term of two years and six months.

It is claimed that the crime of burglary and that of breaking and entering in the daytime are distinct offenses and that a conviction of the latter cannot be had

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under a charge of the former; that inasmuch as the jury adjudged the prisoner not guilty of the former, he was entitled to be discharged; that the court had no jurisdiction to sentence him; hence its judgment was void and the prisoner should be released. Burglary is defined in our statutes as follows: "If any person shall, in the night season, willfully, maliciously and forcibly break and enter into any dwelling house, * * * with intent to kill, rob, commit a rape, or with intent to steal property of any value, or commit any felony, every person so offending shall be deemed guilty of burglary, and shall be imprisoned in the penitentiary not more than ten nor less than one year" (Criminal Code, sec. 48); and the crime of breaking and entering buildings in the daytime is stated as follows: "If any person shall wilfully and maliciously, in the day time, break and enter any dwelling house, * * * with intent to steal, or commit any felony, every person so offending shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding \$500 and imprisonment in the jail of the county not exceeding six months at the discretion of the court." (Criminal Code, sec. 53.) "Burglary is a felony at common law, and a burglar is defined by Lord Coke as 'he that in the night-time breaketh and entereth into a mansion house of another of intent to kill some reasonable creature or to commit some other felony within the same, whether his felonious intent be executed or not.'" (2 Am. & Eng. Ency. of Law, p. 659, note 1.) "Inasmuch as, at common law, burglary could be committed in the night-time only, and as the circumstance of the nocturnal entrance was vital to the offense, the allegation of night-time in the indictment was essential and the indictment was insufficient without it." (3 Ency. Pl. & Pr., p. 741.) That the breaking and entering be in the night-time is, by our statutes, made one of the essential elements of the crime of burglary and must be both pleaded and proved. The crime of burglary as set forth in the Criminal Code differs from that of breaking and

entering buildings in the daytime as described in section 53 of the same Code. A man may not be informed against for one crime and convicted of another and different one. He is entitled to know the nature and cause of the accusation (see Constitution, art. 1, sec. 11), so that he may be enabled to prepare and make his defense, if any he has. The statement of the time as to the crime of burglary is an averment of a material element thereof and must be specifically proved as laid. The crime of breaking and entering buildings in the daytime is not included in a charge of burglary, and a prisoner cannot be convicted of the former under a charge of the latter, or burglary. (*Bromley v. People*, 37 N. E. Rep. [Ill.], 209; *Guynes v. State*, 8 S. W. Rep. [Tex.], 667; *State v. Beher*, 17 Kan., 402; *State v. Adams*, 20 Kan., 329; *Mace v. State*, 9 Tex. App., 110; *Bravo v. State*, 20 Tex. App., 188; *Waters v. State*, 53 Ga., 567; *Williams v. State*, 46 Ga., 212; *State v. Alexander*, 56 Mo., 131.) This being true, the verdict herein did not warrant the court in sentencing the prisoner, as it announced him not guilty of the burglary as charged.

The only further question presented is whether the sentence of the court was merely erroneous or whether it was illegal in such a sense as to be void. It may be said that the modern doctrine or idea is that a court must possess jurisdiction not only of the person and subject-matter, but to impose the sentence which is adjudged. If the latter is lacking the sentence is not merely voidable but void. (Black, Judgments, sec. 258; citing, among others, *Ex parte Lange*, 18 Wall. [U. S.], 63; *Ex parte Miligan*, 4 Wall. [U. S.], 131; *Ex parte Wilson*, 114 U. S., 417; *Ex parte Kearny*, 55 Cal., 212; *In re Petty*, 22 Kan., 477. See, also, *Ex parte Cox*, 32 Pac. Rep. [Ida.], 197; *Ex parte Yarbrough*, 110 U. S., 651.) In the case at bar, the jury having, by its verdict, determined the prisoner not guilty as charged, although it further adjudged him guilty of another crime, the trial court had no jurisdiction to sentence him; hence its attempt in that direction was ille-

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gal in such sense that it was void, and *habeas corpus* the appropriate remedy. (*In re Betts*, 36 Neb., 282; *In re Havlik*, 45 Neb., 747.) It follows that the prisoner must be discharged.

PRISONER DISCHARGED.

NATIONAL BANK OF COMMERCE, APPELLEE, v. PAULINE
CHAPMAN ET AL., APPELLANTS.

FILED FEBRUARY 3, 1897. No. 7047.

1. **Fraudulent Conveyances: INSOLVENCY: RELATIVES.** A debtor in failing or insolvent circumstances may prefer one creditor notwithstanding the fact it may be to the exclusion of others, and this rule may include relatives of the debtor who are his creditors.
2. ———: ———: ———: **BURDEN OF PROOF.** If such transfers between relatives be attacked as fraudulent, the burden is upon the parties thereto to show the good-faith character of the transactions.
3. ———: ———: ———. A son may convey property to his mother in payment of a pre-existing debt to her if such a conveyance is honestly made or without fraudulent intent to the knowledge of the mother, or participated in by her.
4. ———: ———: ———. Findings and judgment *held* contrary to the conclusions established by the evidence.

APPEAL from the district court of Douglas county.
Heard below before WALTON, J. *Reversed and action dismissed.*

W. W. Slabaugh, Isaac Adams, and Webster, Rose & Fish-
erdick, for appellants.

B. N. Robertson, *contra*.

HARRISON, J.

April 29, 1893, the appellee herein filed in the district court of Douglas county a petition or creditor's bill, in

which it was alleged that at the September, 1892, term of court in Douglas county, appellee recovered judgment against Pauline and Eugene B. Chapman in the sum of \$1,126.78, which remained unpaid and on which execution issued April 13, 1893, and was returned April 29 unsatisfied; that the Chapmans were insolvent. It was further pleaded that on July 16, 1891, Eugene B. Chapman and Pauline Chapman conveyed to Eliza A. Hammond certain real estate specifically described, and on February 18, 1892, conveyed to the same person certain other described real estate, and that on April 8, 1893, Eugene B. Chapman, being the owner of a certain lot, lot 2, block 4, Briggs Place addition, the title of record being in E. A. Benson, caused the lot to be conveyed to Eliza A. Hammond;" that the said Eliza A. Hammond paid no consideration for the said lot and that all the said consideration therefor was paid by the said defendant Eugene B. Chapman; that all the said several conveyances herein set forth, by the said Chapman to the said Hammond, were made without consideration and for the purpose of preventing the plaintiff from collecting its said judgment, as the said defendant Eliza A. Hammond well knew; that the title to said premises now stands in the name of the said defendant Eliza A. Hammond, but that the said Eugene B. Chapman is the actual owner of the same." The relief sought was to subject the real estate to the payment of appellee's judgment. The defendants' answer admitted the conveyances of the real estate, but denied "that said conveyances were made by said grantors, or received by said grantee, with any intention to defraud plaintiff in the collection of its judgment, or to hinder or delay said plaintiff in such collection, or to hinder, delay, or defraud any other creditor of said grantors or either of them;" and further pleaded as follows: "Defendants allege that at the time of said conveyances, and long prior thereto, defendant Eugene B. Chapman was indebted to defendant Eliza A. Hammond in a large amount, and that said convey-

ances were made for the purpose of liquidating, in part, said indebtedness, and that said Eliza A. Hammond paid full value for the real estate so conveyed to her. Defendants deny the allegations of said petition respecting the transfer to said Eliza A. Hammond of lot two (2) in block four (4), in Briggs Place addition." The reply was a general denial. There was a trial of the issues, and a decree for appellee in which appeared a finding that the several conveyances were made with the intent on the part of the grantors, the Chapmans, to defraud, hinder, and delay the plaintiff (appellee), of which intent the grantee, Eliza A. Hammond, had full knowledge at the time. From the decree this appeal has been perfected.

It was admitted at the trial that Pauline and Eugene B. Chapman executed and delivered to appellee a promissory note of date February 3, 1891; that action was commenced thereon and judgment obtained during the September, 1892, term of the district court in Douglas county in the amount of \$1,126.78; that execution had issued and been returned of date and indorsed as stated in the petition; that the Chapmans were insolvent and possessed no property liable to execution; also, that the conveyances of real estate by Chapman and wife to Eliza A. Hammond were made of the dates set forth in the petition and the titles thereto stood of record in the name of Eugene B. Chapman on the date of the execution of the note to appellee, to-wit, February 3, 1891. It was also admitted that Eliza A. Hammond was the mother of Eugene B. Chapman. There was no admission in regard to the conveyance of the title of a lot by E. A. Benson to Mrs. Hammond.

It appears from the evidence that Mr. Hammond, the second husband of Eliza A. Hammond, died during the year 1882, having at that time insurance on his life amounting to the sum of \$11,000, and of which Eliza A. Hammond was the beneficiary and from which she received very nearly the whole amount, some \$200 or \$300 less than the face of its policy being paid by one of the

companies or associations. That in September, 1882, Eugene B. Chapman, her son by a first husband, engaged in the wholesale grocery business in the city of Omaha and soon afterwards purchased, with money furnished him by his mother, and for her, lots 15 and 16, in block 7, Reed's first addition to the city of Omaha, taking the title thereto in his own name. Mrs. Hammond, whose home was in St. Louis, removed to Omaha, April, 1883, and soon after, probably during the next month (May), the title to the two lots last described was conveyed to her and she took possession of the property and occupied and used it. January 2, 1885, Mrs. Hammond conveyed to Pauline Hax, who three days later became the wife of Eugene B. Chapman, lot 16 in Reed's first addition to Omaha, receiving as a consideration therefor the promissory note of Chapman in the sum of \$6,000. On March 13, 1888, Mrs. Hammond deeded to Mrs. Chapman the lot 15 in the addition last mentioned, the consideration being \$10,000, evidenced by a promissory note for the whole sum, signed by the Chapmans and the payment thereof secured by mortgage on the property. We will state here that it clearly appears that the property had increased in value and was fully worth the prices which Chapman agreed to pay his mother for it. On March 11, 1890, Chapman desired to procure a loan on the property, and at his request his mother released the \$10,000 mortgage. She then had the one note for \$6,000 and also the \$10,000 note without any security for the payment of the total amount of the indebtedness evidenced thereby. During the year 1887 Chapman discontinued the grocery business and acquired some property and interests in mines in the Black Hills in Dakota, and was buying and accumulating real estate, or interests therein, in Omaha and South Omaha. In January, 1891, Mrs. Hammond gained the knowledge that her son had lost and was losing money in his business ventures and she asked for security or settlement of some nature, and later in the year, or in July, the first deed of which complaint is

made in the petition was executed to her by Chapman and wife, the consideration being the cancellation of the debt evidenced by the \$10,000 note, on which there had been paid prior to this time \$1,000, so that the debt was, in round numbers, \$9,000. On February 18, 1892, there was conveyed to her, by her son and his wife, certain property in payment of the amount due on the \$6,000 note. This was also one of the conveyances attacked by the creditor's bill in this case. We will say here that we are satisfied from a consideration of the evidence in regard to the conveyance of lot 2, block 4, Briggs Place addition, from E. A. Benson to Mrs. Hammond, the validity of which was also drawn in question by the petition, and in issue in this case, was made pursuant to an exchange of lots between Benson and Mrs. Hammond. It is true the son, Chapman, conducted the negotiations, but it is quite clear that it was for his mother and not himself.

We must conclude, after a careful examination of the evidence, that it disclosed a valid indebtedness of the son to the mother, existing and due her at the time the transfers herein assailed were made to her. The son received the mother's money and invested it in property for her, conveyed it to her, and afterwards became its purchaser, and thereby her debtor in the amount of the consideration; that this debt was still in existence, valid and subsisting at the dates of the conveyances of property to her in payment of it. It clearly appears that Mrs. Hammond had full knowledge of and accepted the transfers of the property to her and for the purpose for which they were made. She dealt with some of the property as hers after the transfers. That the Chapmans were in failing circumstances financially, or insolvent, at the times of the conveyances to Mrs. Hammond, constituted at most a fact tending to prove fraud in the transfers. It is the settled rule that a failing or insolvent debtor may prefer one creditor to the exclusion of others, and may pay a *bona fide* demand of one creditor

in preference to those of others. (*Elwood v. May*, 24 Neb., 373; *Lininger v. Raymond*, 12 Neb., 19; *Bank of Commerce v. Schlotfeldt*, 40 Neb., 212; *Meyer v. Union Bag & Paper Co.*, 41 Neb., 67.) And relations are included within the rules just announced. (*Melick v. Varney*, 41 Neb., 105.) See, also, *Ward v. Parlin*, 30 Neb., 376, wherein it was stated: "We have read and scrutinized the evidence in this record with care and it appears to us that the defendant's testimony is consistent and reasonable. We are convinced that Mrs. Ward acted in perfect good faith. True, she knew that her husband was being pressed by his creditors and asked him to secure her. She had a perfect right to make good her claim notwithstanding she knew she was being preferred to other creditors of her husband, if the security was accepted in good faith and without any fraudulent purpose on her part. (*Hill v. Bowman*, 35 Mich., 191; *Jordan v. White*, 38 Mich., 253; *Dice v. Irvin*, 11 N. E. Rep. [Ind.], 488; *Rockford Boot & Shoe Mfg. Co. v. Mastin*, 39 N. W. Rep. [Ia.], 219; *Miller v. Krueger*, 13 Pac. Rep. [Kan.], 641; *Chapman v. Summerfield*, 14 Pac. Rep. [Kan.], 235; *Cornell v. Gibson*, 16 N. E. Rep. [Ind.], 130.)" But in this state, if the good faith of the transaction is attacked, the burden is cast upon them to establish its fairness or good faith character. (*Carson v. Stevens*, 40 Neb., 112; *Melick v. Varney*, *supra*.) There was evidence sufficient to sustain a finding that Chapman had an intent to defraud his creditors, especially appellee, but it is well settled that this, if it existed, would not affect or destroy the right of any of the creditors, including Mrs. Hammond, to secure a preference if not possessed of knowledge of such fraudulent intent. (*Smith v. Schmitz*, 10 Neb., 600; *Edwards v. Reid*, 39 Neb., 645.) The evidence did not show that Mrs. Hammond had any knowledge of any intent on the part of her son to defraud his creditors, or connect her therewith in any manner, but we think established her good faith throughout the transactions prior to and including the conveyances herein sought to be set aside. This being true, it

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follows that the decree of the district court must be reversed and the petition of appellee dismissed.

JUDGMENT ACCORDINGLY.

WALTER KNAPP V. ELLIS O. JONES ET AL.

FILED FEBRUARY 3, 1897. No. 6936.

1. **Damages: CONTRIBUTORY NEGLIGENCE.** In an action for damages alleged to have been produced by the negligence of the defendant in the action, if it appears that the plaintiff's failure to exercise ordinary care under the existing conditions was the cause of the injuries, he cannot recover.
2. **Trial: DIRECTING VERDICT.** If from the undisputed facts different minds might not honestly reach different conclusions or draw different inferences without reasoning irrationally, it is not error on the part of the trial court to withdraw the case from the consideration of the jury and order a verdict consistent with the facts.

ERROR from the district court of Douglas county.
Tried below before SCOTT, J. *Affirmed.*

Connell & Ives, for plaintiff in error.

Breckenridge & Breckenridge, *contra.*

HARRISON, J.

The plaintiff, by his next friend, instituted this action in the district court of Douglas county to recover of the defendants damages which he alleged were caused by injuries to him as the result of negligence on the part of the defendants. The amount claimed was \$15,000. It was stated in the petition that the defendants were the owners and managers of a five-story building in the city of Omaha, the rooms of which, above the ground floor, were occupied and in use as offices by various tenants; that there was a passenger elevator maintained and op-

erated by defendants between the ground floor and upper stories of the building, for the use of tenants and persons having business to transact therein. "The said plaintiff further says that it became and was the duty of the said defendants to use at all times proper and suitable safeguards, appliances, care and skill in the maintenance, repairing, and operation of their said elevator, but that the said defendants, contrary to their said duty, were guilty of such negligence as to the use of proper and suitable appliances and safeguards, and as to the use of care and skill in the maintenance, repairing, and operation of the said elevator, that the plaintiff, by reason thereof, on or about the 14th day of January, 1893, then and there being lawfully in the vicinity of said elevator, suffered great and permanent injuries." Paragraph 4 of the petition contained a specific description of the injuries to plaintiff, and their effect. The answer of the defendants admitted the ownership of the building and its use and occupancy as alleged in the petition and the running of the passenger elevator, and that the plaintiff had been injured in or about the elevator shaft in the building. It was averred that it was not a duty owed by defendants to plaintiff to protect him from injury, and specifically denied that they had been guilty of any negligence in the particulars stated in the petition. It was further pleaded that the negligence, if any other than that of plaintiff caused the injury, was by one Stevenson, who was under contract with defendants doing certain work at the time in and upon the premises. It was further pleaded that the plaintiff's injuries were resultant from his own negligence. A reply was filed and of the issues joined there was a trial before the court and a jury. At the close of the introduction of the evidence, counsel for defendants moved the court to give the jury a peremptory instruction to return a verdict for defendants. This motion was sustained and the jury was charged as follows: "The jury are instructed by the court that under the law and the evidence in this case you will return a verdict for de-

fendants." From a judgment subsequently rendered for defendants, error proceedings have been prosecuted to this court on behalf of plaintiff. The error assigned and urged is the action of the trial court in giving the instruction we have quoted.

There is no conflict in the evidence as to the injuries to plaintiff, or the conditions, facts, and circumstances under which they occurred. The evidence disclosed that there was a stairway by which persons could go to or come from any of the floors of the building, and which was contiguous to the elevator shaft, as was stated by plaintiff in his testimony:

Q. How near was the stairway to the elevator?

A. Runs right around the elevator, close to it.

Q. Is that the way it goes from the ground floor clear up?

A. Yes, sir.

On and above the third, and extending to the fourth floor, this being the portion directly involved herein, separating the stairway space from that of the elevator shaft, was a wainscoting, or board partition, which, from the floor of the third story, was forty-five inches high; from the top of the first step of the stairway, going to the story above, or fourth, was thirty-eight and one-half inches high, and from the top of the second step, and all intervening ones between the second step and the landing above, was thirty-six inches in height. In the further portion of the space between the stairway and the elevator shaft, and above the partition we have just described, between the third and fourth floors, there generally appeared a diamond-shaped wire screen, which, on the day the plaintiff was injured, had been removed to be painted, there being a man there at work under a contract to clean and paint or varnish the elevator shaft, stairway, etc. The plaintiff was, and had been for some three months, in the employ of a physician whose office was situate on the third floor of the building, and had very frequently used the elevator in going up to the office or down to the lower

floor. He knew of the wire screens, had noticed them, and saw the workman remove them from the position they occupied in the shaft, including the one between the third and fourth floor. He testified as to what was done with them when they were taken down, as follows:

Q. When the wire screens were taken out, as you have told that day, what was done with them?

A. They were put at the right of the stairway as you go up at the left hand side.

In regard to the weights attached to the elevator he stated:

Q. Now tell the jury just where they come down and how many of them there are.

A. There was a piece up here, a plank on each side and there the iron weights slid up and down. There was eight of these big iron weights.

Q. And when they came down how close to the rail of the stairs did they run?

A. Came about a couple of inches.

He further stated that at the time of the injury he did not know of the elevator weights.

The plaintiff was, at the time he was injured, between sixteen and seventeen years of age and was, it was stated by one of the doctors who was testifying in respect to plaintiff's condition and appearance before the injury, "a remarkably bright, clean, healthy, active, energetic, genial, pleasant young fellow." But this is immaterial. No question has been raised as to youthfulness and consequent lack of discretion on the part of plaintiff. A few minutes before the noon hour of the 13th of January, 1893, the plaintiff was in the office of the physician, his employer, on the third floor of defendants' building. The doctor was out of the office and building and the plaintiff was evidently expectant of his return. However this may have been, the plaintiff left the office rooms through a door which was, relatively to the elevator, immediately across the hallway, stepped over to the elevator shaft, passed the wire screen, which, as we have before seen,

had been removed from its place and was then upon the floor near the stairway, went up to the second step of the stairs and reaching or leaning over the thirty-six inch high board partition or barrier, put his head and the upper portion of his body into the elevator shaft, as he states it, to look at the elevator which was below to see and ascertain whether the doctor was therein, and coming to the office. The elevator was coming up and the weights down. The plaintiff was struck or caught by the weights in their descent and the injuries to him, the basis of this action, resulted.

As we view the proper final disposition of this action, we need not now consider and settle the questions of the duty of landlords to tenants and their employes, or whether proper care would have required that the elevator in defendant's building, during the time of the painting of the shaft, should have been stopped, and not operated while the screens were out of place and until replaced, for we feel forced to the determination that the evidence discloses such want of ordinary care on the part of plaintiff, under the facts, circumstances, and conditions existent and known to him at the time of his injuries, as constituted his acts contributory negligence and without which the injuries would not have been sustained. This was sufficient to bar his recovery. The defendant knew that the elevator was being operated, he had been riding in it that day, and his direct purpose in looking into the shaft was to see the elevator during its trip upward, and whether the doctor was a passenger. He knew of the wire screens which usually formed a part of the enclosure of the elevator shaft, and had seen them removed but a very short time before, temporarily, to be painted, and had watched the progress of the work. He knew the use for which the elevator shaft was prepared and intended, and he was making a use of it for which it was never intended and to which he possessed no right or privilege, and which was dangerous, against which it was usually guarded in all parts by the screens. In order

to effect his purpose he went up to the second step of the stairs and then leaned over the partition three feet high. These, with other facts in evidence, disclosed conclusively such want of ordinary care as to preclude his recovery of damages. The plaintiff's want of ordinary care and prudence were the cause of the injury, hence he could not recover damages (*Whitaker's Smith, Negligence*, 226; *Pierce v. Whitcomb*, 48 Vt., 127; *Mau v. Morse*, 33 Pac. Rep. [Colo.], 283); and though both plaintiff and defendant might have been negligent in the premises, the plaintiff could not recover if, by the exercise of ordinary care, he could have avoided the injury. (*Omaha Horse R. Co. v. Doolittle*, 7 Neb., 481; *Thompson, Negligence*, 1104.)

It is urged that the question of whether or not there was contributory negligence on the part of plaintiff should have been submitted to the jury. The undisputed facts were such, we think, that different minds might not reach different conclusions or draw different inferences from them in regard to the plaintiff's want of ordinary care and prudence, and the court did not err in not submitting the question to the jury and, on motion of counsel for defendants, charging that body to return a verdict favorable to defendants. In the opinion in the case of *Slayton v. Fremont, E. & M. V. R. Co.*, 40 Neb., 840, appears the following quotation from section 2267, *Thompson on Trials*, in reference to an instruction such as was given in the case at bar: "The demurrer to evidence used in the ancient common-law practice seems to have passed, for the most part, out of use in American jurisdictions. In the place of it the defendant moves for a nonsuit, or requests the court to give a peremptory instruction to the jury to return a verdict for the defendant. In either case the effect is substantially the same as a demurrer to the evidence under the ancient practice. An order of nonsuit, or a peremptory instruction given in compliance with such a motion, does not undertake to decide any question of fact, but simply pronounces the law arising upon the evidence, admitting the same to be true. In

this way the court pronounces upon the legal effect of the facts which the evidence may, in the opinion of the jury, prove. If there is no evidence tending to support the allegations of the plaintiff's declaration, petition, or complaint, it is, under all theories of procedure, the duty of the court to instruct the jury that he cannot recover.' " And it is said in the opinion in relation to the rights or duty of the trial judge to give a peremptory instruction as applicable in that particular case and generally: "The instruction was properly given requiring a verdict for defendant. It could have subserved no useful purpose to either litigant to trust that the jury, upon the submission of the entire case to them, would exercise the same discretion as could reasonably be expected of the trial court. There was no evidence on which the verdict could be sustained, and the trial judge did but his duty in so informing the jury. Often the responsibility of determining questions which should be met by the trial judge is devolved in the last instance upon this court. This is sometimes scarcely fair to litigants, for it frequently happens that the question to be determined is surrounded with difficulties in this court from which the trial court has comparative freedom. When the trial judge approves the jury's estimate of the weight of the evidence adduced, there arises a presumption in favor of its correctness, because both the judge and the jury have had opportunities of observing the deportment of the witnesses and their apparent candor, which are denied this court. When the trial judge is satisfied there is no evidence to sustain a verdict it is his duty to so instruct the jury, for in such a case the merits are presented in this court untrammelled by adverse presumptions." This is quite pertinent and forcible in the case at bar, for had the cause been submitted to the jury and a verdict for plaintiff ensued, it would not have been sustained by the evidence. In support of the same proposition see, also, *Dewey v. Chicago & N. W. R. Co.*, 31 Ia., 373; *Davis v. Hilbourn*, 41 Neb., 35; *Central City Bank v. Rice*, 44 Neb., 594.

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There were some other matters argued in the briefs of counsel, but we do not deem a discussion or decision of them necessary at this time. The judgment of the district court must be

AFFIRMED.

GEORGE J. WOODS, APPELLEE, v CLEMENT L. HART,
APPELLANT.

FILED FEBRUARY 3, 1897. No. 6974.

1. **Conflicting Evidence: REVIEW.** A finding on conflicting evidence will not be disturbed unless manifestly wrong.
2. **Specific Performance: EVIDENCE.** Evidence *held* to sustain findings in an action for the specific enforcement of a contract for the exchange of property.
3. **Fraud: BURDEN OF PROOF.** The burden of proving fraud or misrepresentation in the making of a contract is upon the party alleging it.
4. **Contracts: EXCLUSIVE AGENCY.** A stipulation in a contract giving a person the exclusive agency for the sale of the principal's property for an indefinite period does not render such contract void as being against public policy.
5. **Principal and Agent: REVOCATION OF CONTRACT.** The principal could, at any time before sale, revoke the agent's authority, even though the instrument expressly stipulated that the agent's power to sell should be exclusive.
6. **Exchange of Property: DESCRIPTION.** A contract for the exchange of property is not void for indefiniteness of description where the description is such as, by the aid of evidence *aliunde*, to enable the property to be identified.
7. **Conveyances: CONFLICTING DESCRIPTIONS OF PROPERTY.** Where a contract contains two descriptions of the property to be conveyed, one correct and the other false in fact, the latter should be rejected as surplusage.

APPEAL from the district court of Douglas county.
Heard below before WALTON, J. *Modified and affirmed.*

F. W. Fitch, for appellant:

Where a contract gives the benefit entirely to one person, with the exclusive sale, barter, trade, or handling thereof, it is against public policy. (*Moses v. Scott*, 4 So. Rep. [Ala.], 742; *Baggott v. Sawyer*, 25 S. Car., 405; *Boyle v. Adams*, 52 N. W. Rep. [Minn.], 860.)

A contract formed to establish and maintain a uniform rate of charge and prevent competition in the sale of an article or property, where the entire benefit inures to one of the parties only, is illegal and void as being in restraint of trade. (*More v. Bennett*, 29 N. E. Rep. [Ill.], 888; *Strait v. National Harrow Co.*, 18 N. Y. Supp., 224; *Tode v. Gross*, 127 N. Y., 480; *Chaplin v. Brown*, 48 N. W. Rep. [Ia.], 1074; *Western Wooden Ware Ass'n v. Starkey*, 84 Mich., 76.)

F. H. Woods, contra.

NORVAL, J.

This was an action by George J. Woods to enforce the specific performance of an alleged contract for the exchange of real estate for live stock, of which the following is a copy:

“Article of agreement between George J. Woods, of the first part, and Dr. C. L. Hart, of the second part:

“Said Woods and Hart do this day make the following trade, subject, however, to title: Said Woods agrees to give said Hart lots eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), and fourteen (14), all in block seven (7) of Battle Creek Addition to College View, Lancaster county, Nebraska; said lots to be transferred to said Hart by good and sufficient warranty deed, and clear of all incumbrances of any nature. (Said lots being the ones shown Hart by me.) In consideration of the above described lots, said Hart is to give said Woods the following described cattle:

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Eight head of registered Holstein bulls at \$50.....	\$400
Four head of registered Holstein cows at \$75.....	300
Twenty head of grade Holstein cows and heifers at \$40.....	800
	\$1,500

Being the same cattle picked out by said Woods on June 27, '93; said Hart agreeing to keep said cattle, and in as good condition, for two months from date. He is also to furnish transfers on all registered animals as the Holstein Herd Book demands. He is also to give said Woods a difference of fourteen hundred, to be secured on the above described lots, and to draw seven per cent interest, and to be payable on or before two years from date. Another express consideration of this agreement is that said Woods is to have the exclusive agency for the sale of the lots. This trade is this day made and agreed to by both parties as herein written, all papers to be transferred on or before two weeks from date.

“GEORGE J. WOODS.

“C. L. HART.

“Witness:

“A. R. BOYD.

“Signed this 27th day of Jan., A. D. 1893.’

The plaintiff alleges in his petition the execution of the contract by himself and the defendant, the failure of the latter to comply with the terms thereof on his part, and that the former has been ready to carry out and fulfill each and all the conditions therein on his part to be kept. He also brought into court his warranty deed and abstract of the lots described in the contract, and tenders the same to the defendant, upon his executing a mortgage on the premises for the security of the \$1,500 and the delivery to the plaintiff of the cattle mentioned in said contract. The defendant, for answer, denies that he ever made, entered into, or signed the contract declared on,

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and pleads other defenses which will not now be stated. The court found generally for the plaintiff, and a decree was entered that defendant should perform specifically the contract within twenty days, and that in default thereof plaintiff have judgment against Hart for the sum of \$1,500, with interest thereon at seven per cent from January 27, 1893. Defendant appeals.

The findings and decree are assailed as not being sustained by the evidence. Attention will first be given to the question, was there a contract between the parties? Stated in a different form, did the defendant sign the alleged agreement which it is sought to have enforced in this case? The record discloses that plaintiff, George J. Woods, resided in the city of Lincoln, and that the defendant, Clement L. Hart, was a physician residing in the city of Omaha, and owned a farm in Hall county, near Cairo, stocked with cattle; that on the 25th day of January, 1893, Hart went to Lincoln to employ Colonel Woods, plaintiff's father, to sell some cattle for defendant; that the colonel not being at home, Hart explained his business to George J. Woods, informing him of the kind and number of cattle he had for sale, and during the conversation the latter made a proposition to exchange real estate for the former's cattle. The parties do not agree in what was said, but they both unite in saying that the subject of trading real estate for cattle was discussed; that the defendant went with plaintiff to College View, a suburb of the city of Lincoln, and looked at some lots in that vicinity which Woods claimed to own and proffered to exchange. That the same day Hart took the train for Grand Island, where he remained over night, going out to Cairo in the forenoon of January 26. On the same day Woods went to Cairo to look at defendant's cattle, arriving so late that, on account of darkness, no satisfactory examination could be had, although an attempt to do so was made. The next morning both parties went to see the cattle, when those involved in this litigation were selected and picked out of defendant's herd. Mr. Hart

testified that, owing to his physical condition at that time, he has no distinct recollection of the conversation which occurred between them on the morning of January 27, and further, that he never signed the paper alleged to be the contract in question, and never saw the same or knew the contents thereof until this suit was instituted. Lewis Schwalerberg and other witnesses called by the defendant, and who were familiar with his handwriting and signature, testified on the trial that Hart's signature to the contract was not genuine. The testimony of the plaintiff is to the effect that in pursuance of an appointment made with the defendant, he went to Mr. Hart's farm near Cairo on January 26 to look over the cattle and to agree upon terms of exchange; that on arriving at Cairo, Woods employed one A. R. Boyd, a liveryman, to drive him to defendant's place; that on reaching the farm plaintiff and defendant, in the presence of Boyd, Eli Hart, a brother of defendant, and another person, looked over the cattle and agreed upon prices; that plaintiff, on his return to Cairo, was to prepare the contract in duplicate and return the next morning, when it was to be executed and the cattle sorted out; that plaintiff, as requested, drew up the agreement, and returned the next morning with Mr. Boyd, when the cattle were selected and driven into a corral, and that after this was done plaintiff and defendant went into the barn of the latter, where both signed the contract with a lead pencil, in the presence of Mr. Boyd. The testimony of plaintiff relating to the selection of the cattle and to the signing of the contract is in every essential part corroborated by the deposition of Mr. Hart, which is set forth in the bill of exceptions. It was also shown that a few days after January 27 the defendant wrote and sent to the plaintiff the following letter:

"CAIRO, HALL CO., NEBR., 7, 93.

"George J. Woods, Esq., Lincoln, Nebr.—DEAR SIR: I am giving all my time to the cattle, fixing up the sheds, etc. Shall do all in my power to keep the cattle in good condi-

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tion as the severity of the weather, and neglect of the cattle before I came, will allow.

"I do not want a deed of lots, only land contract for reasons I will give you when I see you. I shall not be able to get there in two weeks with (?) leaving the stock to the tender mercies of that boy, which I dare not do. I have rented the farm to what seems to be a good man, and expect him on between now and Mch. 1st. When he comes I shall not have to depend upon such a boy.

"When I come through Lincoln, I will call upon you.

"Truly yours,

C. L. HART."

The foregoing letter is unexplainable upon any other hypothesis than that some sort of a contract or agreement existed between Woods and Hart relating to the exchange of lots for cattle, and in view of this letter, and the evidence adduced on behalf of the plaintiff already mentioned, it is not surprising that the trial court found the contract set forth in the petition was entered into by the defendant as alleged. Certainly such finding is not only sustained by the evidence, but by the clear preponderance thereof.

Another defense interposed is that the contract was entered into through the fraud and misrepresentation of the plaintiff as to the location of the lots; hence a court of equity will not decree specific performance. This defense is inconsistent with the one just noticed, and must be regarded as an admission that the defendant executed the contract. Woods and Hart are the sole persons who have any knowledge whether the lots described in the contract were the ones shown by the former to the latter on January 25, the day the negotiations for the exchange of properties first commenced, and their testimony on the subject fails to harmonize. The defendant testified that he never saw the lots mentioned in the contract before the trade was made; that they are not situated in College View proper, but in Battle Creek Addition thereto, and located a considerable distance east of the college buildings; that the lots, seven in number, which Woods showed

him on that occasion, and offered to trade for the cattle, were situated in College View proper, about a quarter of a mile west or northwest of the college buildings, and about on a level therewith. We reproduce from the bill of exceptions the following from the testimony of George J. Woods, the plaintiff:

Q. What property was it you showed Dr. Hart?

A. Lots 8, 9, 10, 11, 12, 13, and 14, in block 7, Battle Creek Addition to College View, Lancaster county, Nebraska.

Q. State what, if any, other property besides that mentioned in the contract you showed Hart at the time he was in Lincoln, if any at all.

A. I did not show him any.

Q. Did you offer to trade him any other property?

A. No, sir.

The burden was upon the defendant to establish by the preponderance of the testimony his charge of misrepresentation and fraud as regards the location of the property which was to be exchanged for the cattle. In our view, he did not establish this defense, but the court was fully warranted in giving credence to the direct and positive testimony of the plaintiff above quoted, especially in view of the fact that the defendant under oath denied his own signature to the contract which is made the foundation of this suit.

Another reason urged for refusing the enforcement of the contract is the inadequacy of consideration. It will be observed that in the trade the lots were put in at \$2,900. The testimony bearing upon the question of the value of the lots at the time of the making of the contract was given by real estate agents, and, as might have been expected, was of the most conflicting character. The values placed upon the lots by the defendant's witnesses are as follows: F. W. Brown, \$50 each; A. E. Moeller, \$200 a lot; A. N. Wycoff, \$100 apiece; F. L. Dunn, from \$200 per lot to \$3,000 for the seven. The average valuation placed on the lots by plaintiff's wit-

nesses was over \$400 apiece. The consideration for the contract to be furnished by Woods was not unjust or inadequate, but, on the contrary, if the testimony of his witnesses is to be given credence, the defendant obtained an advantage over plaintiff in the bargain as made. It is a well recognized rule that the finding of the trial court, when based upon conflicting evidence, will not be disturbed by the reviewing court, and the doctrine will be adhered to and applied in the case under consideration.

It is argued that specific performance should be refused, because the defendant did not make a sale of the lots in ninety days from the date of the trade. The contract declared on contains no such stipulation or guaranty. It is true a verbal agreement having such a provision is pleaded by the defendant in his answer, and his testimony tended to support the averment; but the trial court found against the existence of such a contract, and such finding is not without support in the testimony; hence, plaintiff was not required to effect a sale of the lots in order to entitle him to a specific enforcement of the contract against Dr. Hart. Moreover, it does not appear that the latter ever advised the plaintiff of the terms upon which the lots were to be sold.

The next contention is that the contract is void as being against public policy, in that it provided that "Woods should have the exclusive agency for the sale of the lots." Such provision did not, in the least, operate against the interests of the public, nor yet against those of the defendant, since the appointment as agent was not for a fixed or definite period. The power or right of revocation of the agency remained in Hart, and he could have exercised the same at any time, or sold the property himself. (*Chamber v. Seary*, 73 Ala., 372.) Not one of the cases cited by appellant supports the doctrine that the clause under consideration renders the contract void. Suffice it to say that they merely held that contracts in restraint of trade, or those made for the purpose of preventing competition at auction and other public sales, are contrary to public policy, and therefore void.

Complaint is made that the cattle which the decree requires the defendant to deliver are not the same as designated in the contract. In the decree they are described as "four (4) head of registered Holstein bulls, five (5) head of registered Holstein cows, and twenty-five (25) head of grade Holstein cows and heifers," which states the number of each class differently from that given in the contract; and hence it is claimed that the decree has made a new and different contract for the parties. This objection would be unanswerable if the number and class constituted the only description of the cattle contained in the contract. But such is not the case. The stock intended to be exchanged is expressly designated in the written agreement as "being the same cattle picked out by said Woods on January 27, 1893." This description alone would have been sufficient, for the particular cattle to which the contract was intended to apply could be established by the aid of extrinsic testimony. There was no uncertainty in the description, for that is certain which is capable of being made so by evidence *aliunde*. The authorities agree that parol evidence is admissible to identify the subject of a written contract. (Bishop, Contracts, sec. 376, and cases cited in notes.) The undisputed testimony is to the effect that on January 27, 1893, the parties to the contract selected from the defendant's herd nine registered Holsteins, four being bulls and five heifers, and also twenty-five graded Holstein cows and heifers, and that the entire thirty-four head were put into an adjacent pen or corral, and set apart as the cattle to be exchanged for the lots. So that the cattle mentioned in the decree were the ones actually picked out and selected, and therefore not different from those covered by the contract. That part of the description of the cattle in the contract which gave the number of each kind or class was false, and under the rule laid down in *Hubermann v. Evans*, 46 Neb., 784, should be rejected, since the remainder of the description is sufficient to enable the cattle to be identified.

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The only substantial error in the record is the finding that the plaintiff should have judgment for \$1,500, with interest thereon from January 27, 1893, in case defendant failed to deliver the cattle within the time mentioned in the decree. The cattle were to be retained by Hart for sixty days from the making of the contract. It was unjust to allow interest from the date of the contract. It should have been computed from March 27, 1893, the period fixed for delivery. The decree is accordingly modified, and as thus modified is affirmed.

DECREE MODIFIED.

RAYMOND BROTHERS & COMPANY V. THEODORE H.
MILLER ET AL.

FILED FEBRUARY 3, 1897. No. 7004.

Trover and Conversion: MORTGAGED CHATTELS: PLEADING. In an action by a mortgagee of chattels against a stranger for the conversion of the mortgaged property, the petition must set out the facts constituting plaintiff's special ownership. A mere allegation that he has a special ownership, right, title, and lien upon and to the property, by virtue of a chattel mortgage given to him thereon by a designated person, is not alone sufficient.

ERROR from the district court of Saline county. Tried below before HASTINGS, J. *Reversed.*

G. M. Lambertson and F. M. Hall, for plaintiffs in error.

F. I. Foss, Hastings & McGintie, and *W. R. Matson*, *contra.*

NORVAL, J.

This is an action of conversion. There was a judgment for plaintiffs below, and defendants prosecute error.

Of the numerous errors assigned and argued by counsel, we do not deem it necessary to discuss more than one,

namely, that the petition fails to state sufficient facts to constitute a cause of action, which was duly raised at the outset of the trial in the court below by objections to the admission of testimony on that ground, and again after verdict by the motion for a new trial, as well as by proper assignment in the petition in error filed herein. The allegations of the petition, so far as they are necessary to a determination of the question to be decided, are: "That on the 25th day of July, 1888, the plaintiffs were entitled to the immediate possession of the following described goods and chattels, and had a special interest and ownership in the said goods and chattels to the amount of \$2,009.43, with interest at the rate of ten per cent from July 25, 1888, to-wit, the entire stock of groceries, dry goods, clothing, queensware, wooden and willow ware, boots and shoes, hats, caps, and notions, glassware, tobacco, cigars, furniture, fixtures, scales, tanks, etc., including all of the stock of furniture and chattels, of every name and nature whatever, which are contained in a certain brick building and cellar used by Pronger & Clarey in their mercantile business in Crete, Saline county, Nebraska, of the value of \$6,500." It is alleged that they have special ownership, right, title, and lien upon and to the above described goods by virtue of a chattel mortgage given to them upon the same by the said Pronger & Clarey, dated July 25, 1888, and duly recorded in the clerk's office of Saline county, Nebraska, a copy of which mortgage is attached, marked "Exhibit A." It is also alleged, in substance, that defendants took possession of the property under and by virtue of a chattel mortgage against Pronger & Clarey, and converted the same to defendants' own use. It will be observed that there is no averment in the petition to the effect that plaintiffs are the general owners of the chattels in controversy, but that they predicate their right to recover damages for the alleged conversion merely upon a claim of special interest or ownership in the property arising by virtue of a chattel mortgage. The terms and condi-

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tion of the mortgage are not pleaded, nor any facts averred which disclose that any of the stipulations therein contained have been broken, or that anything is due plaintiffs upon the mortgage. It is true the petition states that a copy of the mortgage is hereto attached as an exhibit, but an examination of such exhibit reveals that it is a copy of a mortgage given by Pronger & Clarey to the defendants, Raymond Bros. & Co., and it is not averred that it has been assigned to the plaintiffs below, or that they are the owners thereof or of the debt secured thereby; hence, instead of its showing a lien or interest in the property in them, it clearly negatives any such idea. Plaintiffs, in order to set forth a cause of action, were required to plead in their petition the facts constituting their special interest in the property, as well as the facts relied upon to entitle them to maintain an action for conversion against the defendants. This they have not done. It has been repeatedly asserted by this court that a petition in replevin, by a mortgagee of chattels against the mortgagor or a stranger, must set out the facts creating his lien or special ownership and the facts entitling him to the possession, and if the pleading fails to do so it is fatally defective. (*Musser v. King*, 40 Neb., 892; *Randall v. Persons*, 42 Neb., 607; *Sharp v. Johnson*, 44 Neb., 165; *Camp v. Pollock*, 45 Neb., 771; *Strahle v. First Nat. Bank of Stanton*, 47 Neb., 319; *Garber v. Palmer*, 47 Neb., 704.) The same rule of pleading applies to actions for conversion by mortgagee. The conclusion is irresistible that the petition, for the reason stated, fails to state a cause of action. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

FRED DREXEL ET AL. V. JAMES RICHARDS, IMPEADED
WITH ROLLIN L. DOWNING ET AL., APPELLANTS, AND
KENNARD GLASS & PAINT COMPANY ET AL., APPEL-
LEES.

FILED FEBRUARY 3, 1897. No. 6708.

1. **Mechanics' Liens: STATEMENT: DESCRIPTION.** The sworn statement of a subcontractor for a mechanic's lien must contain a description of the premises on which the improvement was erected.
2. ———: ———: ———. Such a description is not insufficient if it renders the location of the property susceptible of ready ascertainment by the aid of extrinsic evidence.
3. ———: ———: ———. The account of the items for the materials furnished and labor performed by a contractor or subcontractor, and for which a lien is claimed, and the affidavit thereto attached should be construed together, and if when thus construed they substantially comply with the statute it is sufficient.
4. ———: ———: ———. A description of property in a statement for a mechanic's lien as the "Bartlett & Downing Block, Kearney, Buffalo county, Neb.," is a sufficient description of the premises, especially when there are no rights of third parties to be affected by the lien.

REHEARING of case reported in 48 Neb., 732. *Decree below affirmed.*

Calkins & Pratt, for appellants.

B. G. Burbank, Kennedy & Learned, and Marston & Nevius, contra.

NORVAL, J.

This is a rehearing of the case reported in 48 Neb., 732. From a decree foreclosing certain mechanics' liens the defendants Bartlett & Downing appealed. On the former hearing the decree, in so far as it awarded the Kennard Glass & Paint Company a lien, was reversed because of an insufficient description of the premises, and in all other respects the decree of the trial court was

affirmed. The following propositions were laid down in the opinion heretofore filed:

1. A sworn statement for a mechanic's lien by a subcontractor must describe the land on which the materials furnished by him have been used in making the improvement.

2. Such description, to be sufficient, must be such as, aided by extrinsic evidence suggested by the description itself, would charge a party dealing with real estate with notice of such claim for lien. In other words, the description of the premises must be sufficiently accurate and definite to render their location susceptible of ready ascertainment.

3. The description of the property in the mechanic's lien account of the Kennard Glass & Paint Company is so defective as to render the lien void.

We are content with the doctrine announced in the first proposition above stated. The statute requires the affidavit, or sworn statement, of the subcontractor for a mechanic's lien to give a description of the premises upon which the labor was performed, or materials were used, as much as it does a statement of the amount due him. No other reasonable construction can be placed upon section 2 of our mechanics' lien law. The description need not be inserted in the affidavit proper. It is sufficient if it is set forth in the itemized account or bill which is made a part of the lienor's affidavit. The account of the items attached and referred to in the affidavit, or made a part thereof, and the affidavit proper are to be considered together, and when thus construed, if they meet the substantial requirements of the statute, it is sufficient. (*Henry & Coatsworth Co. v. Fisherdict*, 37 Neb., 207; *Noll v. Kenneally*, 37 Neb., 880.)

Upon a careful review of the authorities we adhere to the views announced in the former opinion as embraced in the second proposition stated above. The object of the statute in requiring the description of the property in the sworn statement of a mechanic's lien of a subcon-

tractor is to advise the owner of the property, as well as the public, of the claim of such subcontractor, by the examination of the records of the county. The legislature has not undertaken to define the manner in which the property shall be described in the claim for lien. A description of the property is indispensable to the validity of the lien. It is obvious, therefore, that any description will suffice which will carry out the purpose of the law, whether it be by metes and bounds, by lot and block numbers, by governmental subdivisions, or by such general description of the property as will enable a person acquainted with the locality to identify it. Any description of the premises in a mechanic's lien will suffice which renders the location susceptible of ready and easy ascertainment, and apprises the owner and third parties of the claim of the lienor. A description of the property in a statement for a mechanic's lien as "The Lincoln Hotel, in the city of Lincoln, Nebraska," or the "Burr Block" in said city, most assuredly would not be void for indefiniteness of description, since either is amply sufficient for the identification of the premises intended to be described. The rule laid down in the adjudicated cases is that a description sufficient to sustain a mechanic's lien is one which enables a party familiar with the locality to identify the property with reasonable certainty upon which the lien is claimed. In addition to the authorities cited in the former opinion, see *Kezartee v. Marks*, 15 Ore., 529; *Tredinnick v. Red Cloud Consolidated Mining Co.*, 72 Cal., 78; *Harrisburg Lumber Co. v. Washburn*, 44 Pac. Rep. [Ore.], 390; *Springer v. Kroeschell*, 161 Ill., 358; *Rockwell v. O'Brien-Green Co.*, 62 Ill. App., 293; *O'Brien v. Krockinski*, 50 Ill. App., 456; *Buchannan v. Cole*, 57 Mo. App., 11; *Bambrick v. King*, 59 Mo. App., 284; *National Lumber Co. v. Bowman*, 42 N. W. Rep. [Ia.], 557; *Myers v. Maverick*, 27 S. W. Rep. [Tex.], 950, 1083; *Scholes v. Goodall*, 77 Tex., 482; Phillip, *Mechanics' Liens*, secs. 379, 381. It will be observed that in the statement of the account for a lien in this case, and to which the affidavit of the lienor was attached, the premises are described as the

"Bartlett & Downing Block, Kearney, Buffalo county, Nebraska." They are repeatedly designated in the testimony by the witnesses as the "Bartlett & Downing Block." Applying thereto the rule announced in the former opinion, as well as the definition given herein of a sufficient description of property in a claim of lien, the description under consideration is sufficient, since there are no rights of third parties to be affected by the lien. The owners of the premises could not have been misled by the description, much less does the evidence show that they were in any manner deceived thereby.

It is argued that the description in a mechanic's lien must be a numerical one, else the lien cannot be entered on the numerical indexes kept in the recorder's office. The statute contemplates that mechanics' liens shall be entered upon such indexes. (Compiled Statutes, ch. 18, art. 1, sec. 85.) But the failure to do so would not defeat the lien if the claim for a lien has in all other respects been properly recorded. (*Lincoln Building & Savings Association v. Hass*, 10 Neb., 581.) It therefore logically follows that a numerical description is not indispensable to the validity of a mechanic's lien.

It is finally argued that the lien is invalidated by the insertion in the affidavit for lien by the recorder of Buffalo county, after it was sworn to, the numerical description of the property. It was thus inserted by the express direction of the person who made the affidavit. Moreover, the other description of the property was ample to support the lien; hence the added description was an immaterial alteration of the affidavit. The affiant had a right to change it at any time before it was filed for record, subject, however, to being disregarded as to the amendments made after the affidavit was sworn to. The judgment of this court on the former hearing reversing the decree of the court below in favor of the Kennard Glass & Paint Company and dismissing its cross-petition is vacated, and the decree of the district court is in all respects

AFFIRMED.

FIRST NATIONAL BANK OF DUBUQUE, IOWA, v. H. C.
MCKIBBEN.

FILED FEBRUARY 3, 1897. No. 6985.

1. **Negotiable Instruments: ACTION BY INDORSEE: BURDEN OF PROOF.**
In an action by an indorsee of a negotiable promissory note against the maker, its mere production by the plaintiff, duly indorsed, raises a presumption of law that it was transferred before maturity and for value, and the burden is on the defendant to show that plaintiff is not an innocent holder.
2. ———: ———: **DEFENSE.** *Held*, That the answer falls to state a defense.
3. ———: ———: **EVIDENCE.** Evidence examined, and *held* not to sustain the verdict.

ERROR from the district court of Dawson county. Tried below before HOLCOMB, J. *Reversed*.

G. W. Fox, for plaintiff in error.

E. A. Cook, *contra*.

NORVAL, J.

This is an action brought by the plaintiff as indorsee of two promissory notes executed by the defendant for \$100 each, payable to the order of Chamberlain Plow Company, bearing date June 21, 1887, and maturing November 1, 1887, and January 1, 1888, respectively. Defendant, in his answer, admits the execution and delivery of the notes, denies that they were indorsed to plaintiff before maturity, and sets up the following facts as a defense: "That after the maturity of the second note this defendant indorsed and transferred to the said Chamberlain Plow Company, at its request, one certain promissory note for \$300, signed by one J. L. Dougherty and payable to this defendant, to secure the payment of the notes sued on in this action; that the maker of said note at the time of delivering the same to the said Chamberlain Plow

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Company, and at the time that said note became due, was solvent and able to pay the same; that afterwards, on the 6th day of August, 1889, the said Chamberlain Plow Company obtained a judgment on said promissory note against the said J. L. Dougherty for the sum of \$335.92; that said promissory note was only transferred to the said Chamberlain Plow Company to secure the note sued on and in payment of the same and for no other purpose; that said Chamberlain Plow Company holds said judgment at this time; that said judgment cannot now be collected; that said note of said Dougherty could have been collected at its maturity if the said Chamberlain Plow Company had used the diligence in its collection that said company agreed to use; that this defendant had been greatly damaged by the neglect of the said Chamberlain Plow Company in its failure to carry out its said contract and agreement in the collection of said promissory note to an amount greater than the notes sued on; that the promissory notes sued on were in the hands of, and owned by, said plow company at the time of their maturity. This defendant also delivered to said plow company, to secure said notes, other notes signed by Ira Barnes, C. Davis, J. W. Ervin, and — Baker." The reply consisted of a general denial. There was a jury trial which resulted in a verdict for the defendant in the sum of \$1, which amount the defendant remitted, and thereupon the court overruled plaintiff's motion for a new trial, and rendered a judgment of dismissal. Plaintiff is here on a petition in error.

The verdict and judgment cannot stand, for two reasons, viz.: (1.) They are not sustained by the evidence. (2.) The answer does not state a defense.

The defendant having admitted the execution and delivery of the notes, the burden of proof that the bank was a *bona fide* holder for value before maturity was not cast on it, but the burden was on the maker to disprove this fact. (*Cottage Organ Co. v. Boyle*, 10 Neb., 409; *Coakley v. Christie*, 20 Neb., 509; *Violet v. Rose*, 39 Neb., 660; *Mc-*

Donald v. Aufdengarten, 4 Neb., 40; *Kelman v. Calhoun*, 43 Neb., 157.) An examination of the evidence contained in the bill of exceptions not only fails to show that the bank did not purchase these notes in good faith before due, but on the contrary it establishes that the bank bought them a few days after their date in the usual course of business without notice of any defense, and at the time paid therefor the sum of \$200. The fact that plaintiff failed to notify defendant it owned the notes, or to bring suit thereon, until long after their maturity, is insufficient to overcome the direct and positive evidence of Guernesey, the cashier of the bank, as to the time and manner of the purchase of the notes from the payee. The mere production of the notes, duly indorsed, raised a presumption of law that they were transferred before maturity and for value, and this *prima facie* case was not overthrown by the evidence adduced on the trial.

The answer filed by the defendant is faulty, in that it omits to plead that the notes in controversy were the property of the payee, the Chamberlain Plow Company, when the collateral notes were turned over to them. The allegation is "that the promissory notes sued on were in the hands of and owned by said plow company at the time of their maturity," and that the collateral notes were indorsed and delivered after the maturity of the second note. Again, the answer charges, in general terms, that defendant was damaged by the failure of the payee to carry out its contract and agreement in the collection of the collateral, but no contract or agreement on the subject is pleaded. In these respects the answer was defective. Under the evidence the court should have directed a verdict for the bank. The judgment is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

CITY OF FLORENCE V. MARY A. WHITE.

FILED FEBRUARY 3, 1897. No. 7066.

Adverse Possession. One who has been in the open, notorious, exclusive adverse possession of real property for ten years becomes vested with a valid title to the same.

ERROR from the district court of Douglas county.
Tried below before SCOTT, J. *Affirmed.*

McCoy & Olmsted, for plaintiff in error.

Slabaugh & Rush, *contra.*

RYAN, C.

This was an action of ejectment brought in the district court of Douglas county January 1, 1893. The subject-matter of the litigation was known as "South Market Square," in the city of Florence. The plaintiff in the district court, Mary A. White, alleged that she had a legal and equitable estate and was entitled to the possession of said square, and that ever since November, 1888, the defendant, the city of Florence, had unlawfully kept her out of possession. There was a prayer for possession and for damages which she alleged she had sustained by reason of the aforesaid wrongful dispossession. Issues having been duly joined, there was a verdict in favor of Mrs. White, in which her damages were assessed at the sum of five cents, and to reverse the judgment rendered upon this verdict there has been prosecuted these error proceedings by the city of Florence.

There was a special finding, upon sufficient evidence, that Mrs. White first took possession of the square in dispute and placed a fence around it in March, 1868. There was evidence to justify the conclusion that this possession of Mrs. White was open, adverse, and continuous until some time in the year 1881, from which time

until suit brought there is a serious conflict as to who was in possession until the year 1888. There was, therefore, sufficient evidence to sustain the general verdict, from which it must be implied that before the year 1881 Mrs. White had acquired title by virtue of her actual, continuous, and notorious adverse possession. (*Gatling v. Lane*, 17 Neb., 77, 80; *Haywood v. Thomas*, 17 Neb., 240; *Horbach v. Miller*, 4 Neb., 47; *Pettit v. Black*, 13 Neb., 142; *Stettinische v. Lamb*, 18 Neb., 626; *Parker v. Starr*, 21 Neb., 680; *Gue v. Jones*, 25 Neb., 634; *Lantry v. Parker*, 37 Neb., 353.)

It is insisted that there was no evidence of declarations of Mrs. White as to her intention in taking and maintaining the possession upon which she founded her title. There was evidence, however, that she took possession, fenced, and year by year leased the property to a tenant who cultivated it, or herself planted corn on it, during the period above indicated of more than ten years, with intention of holding it as a homestead. There was no necessity that she should give notice of her intentions otherwise than as she did; that is, by fencing the property and using it as her own, independently of all the world.

There was an offer of evidence by the plaintiff in error to show that it was customary, during the period intervening between 1868 and 1881, for residents of Florence to take possession of streets and other property of the city with the purpose of using them temporarily, without making claim of title founded on such possession, and that the city authorities acquiesced in such possession. This was not claimed to be such an established, recognized custom, by reason of its universality, that it was presumable that Mrs. White was acting with reference to it and should be governed by it. The proffered evidence was, therefore, properly excluded.

There is no special argument directed to instructions, either given or refused; indeed, there was no assignment of error in the motion for a new trial which would permit of consideration, except as to an instruction of the plaintiff.

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iff in error which was refused, but as the essential substance of this was given in another instruction by the court on its own motion, there is no ground for complaint because of the refusal to instruct as requested. The judgment of the district court is

AFFIRMED.

TECUMSEH NATIONAL BANK V. CHARLES BEST.

FILED FEBRUARY 3, 1897. No. 7030.

1. **Successor to Bank: ASSUMPTION OF LIABILITY: PLEADING.** A petition of a creditor of a banking association which discloses that another bank, as successor of said association, had assumed the liabilities upon a sufficient consideration moving from said association, and that the claim of plaintiff was one of said liabilities remaining unpaid, states sufficient facts to entitle to relief as against the bank which assumed the aforesaid liabilities.
2. **Bill of Exceptions: REVIEW.** A bill of exceptions must contain all the evidence upon which questions of fact are to be determined, a reference in such bill to evidence to be found by reference to another bill, filed in an independent case, not being sufficient.

ERROR from the district court of Johnson county.
Tried below before BABCOCK, J. *Affirmed.*

John H. Ames, C. Gillespie, and S. P. Davidson, for plaintiff in error.

T. Appelget, J. Hall Hitchcock, and L. C. Chapman, contra.

RYAN, C.

In this case there was a judgment against the Tecumseh National Bank as prayed by the plaintiff in the district court of Johnson county. The bank seeks a reversal of this judgment on two grounds, of which the first is that the petition failed to state a cause of action. The second is that the finding against the bank was not sustained by the evidence.

The averments of the petition, in substance, are that about May 1, 1889, James D. Russell, Charles A. Holmes, Warren Holmes, and James Bennett, as an association under the name of Russell & Holmes, were doing a general banking business in the city of Tecumseh under and by virtue of the laws of this state; that of this association James D. Russell was president, Charles A. Holmes was vice president, Warren Holmes was cashier, and James Bennett was assistant cashier; that on or about August 14, 1890, the said association resolved to become a national banking association under the name of the Tecumseh National Bank, and pursuant to said resolution made the organization certificate required by the comptroller of the currency of the United States; that said national banking association duly filed its articles and certificate of incorporation, and, as a body corporate, proceeded to do a banking business in the building in which the banking business of Russell & Holmes had previously been transacted; that of this national bank Charles A. Holmes was president, Warren Holmes was cashier, and James Bennett was assistant cashier, and that the Tecumseh National Bank is a thing continuous of the banking association of Russell & Holmes, the name alone being changed. In this connection the petition contained the following language: "This plaintiff further avers the fact that the real property, consisting of a banking building (which was the bank of Russell & Holmes, and where they had for many years transacted business), furniture, cash, bills receivable, and the assumption and the agreeing to pay debts owing and obligations to become due of the said banking firm of Russell & Holmes, when the Tecumseh National Bank was formed as aforesaid, was vested in and became the property, rights, and liabilities of the said Tecumseh National Bank." Immediately following the above description of the officers of the Tecumseh National Bank in the petition there were the following allegations: "That each of the persons last above named became the owner of a large amount of

shares or certificates of stock of the said Tecumseh National Bank at the time it was organized, and that the said certificates or shares of stock were given to said persons for the real property, cash, bills receivable, good will, rights, and choses in action, and the assumption of and agreeing to perform all debts, contracts, and obligations outstanding which was to be done or performed by the banking association of Russell & Holmes." In the language quoted there are allegations of assumption by the Tecumseh National Bank of the liabilities and obligations of its predecessor, founded upon an adequate consideration, sufficiently described. By the further averments of the petition that the claim sued upon was one of the liabilities assumed by the Tecumseh National Bank, and within the rule laid down in *Shamp v. Meyer*, 20 Neb., 223, an action is maintainable by the beneficiary against the bank. This rule has received the approval of this court in numerous cases considered subsequently to that above cited. (*Keedle v. Flack*, 27 Neb., 836; *Fonner v. Smith*, 31 Neb., 107; *Kaufman v. United States Nat. Bank*, 31 Neb., 661; *Hale v. Ripp*, 32 Neb., 259; *Sample v. Hale*, 34 Neb., 220; *Barnett v. Pratt*, 37 Neb., 349; *Doll v. Crume*, 41 Neb., 655; *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb., 44; *Hare v. Murphy*, 45 Neb., 809.) The petition must be held, therefore, to have stated a cause of action in favor of the plaintiff therein named.

Whether or not there was sufficient evidence to sustain the averments of the petition, denied, as they were, by the answer, we cannot determine, for the bill of exceptions in this case does not purport to contain all the evidence on which the case was tried. For a part of this evidence we are therein referred to the bill of exceptions in the case of *Saunders v. Tecumseh National Bank*. We cannot look into another case than this for the purpose of ascertaining what evidence should be considered in the case before us. (*Lowe v. Riley*, 41 Neb., 812; *State Ins. Co. v. Buckstaff*, 47 Neb., 1. The judgment of the district court in this case is

AFFIRMED.

TECUMSEH NATIONAL BANK V. ANNA B. SAUNDERS.

FILED FEBRUARY 3, 1897. No. 7028.

Successor to Bank: ASSUMPTION OF LIABILITY: ACTION BY CREDITOR:
VERDICT FOR PLAINTIFF: EVIDENCE. The evidence in this case examined, and held not sufficient to sustain the judgment of the district court. NORVAL, J., dissents.

ERROR from the district court of Johnson county.
Tried below before BABCOCK, J. *Reversed.*

John H. Ames, C. Gillespie, and S. P. Davidson, for plaintiff in error.

T. Appelget, J. Hall Hitchcock, and L. C. Chapman, contra.

RYAN, C.

There was a judgment in favor of Anna B. Saunders in the district court of Johnson county, of which the judgment defendant seeks a reversal in this court. With this there were submitted eight other cases, in each of which the Tecumseh National Bank was the plaintiff in error, the defendants in error being, respectively, Andrew Head, Ann Smith, Sarah A. Brown, Allora Hull, Elias Young, Alice Kershaw, Jane Turner, and Luke Corson. On behalf of all parties, it was earnestly requested on the argument that the evidence should be considered with reference to its sufficiency to sustain a verdict, and, if there was not sufficient for that purpose, that this court should so indicate, thereby enabling the parties litigant in all the cases to avoid further costs, for it was conceded by each party that in any further trial of either case the evidence must necessarily be the same as is contained in the bill of exceptions herein submitted for our examination. We have, therefore, given the careful examination to the evidence which the interests involved demand, and shall, without separate discussions, direct in each case such

future action to be taken as we shall find to be proper from our consideration of this evidence.

The original petition in this case was filed August 19, 1893, against the Tecumseh National Bank, as successor of the Banking Association of Russell & Holmes, for the collection of a certain indebtedness of Russell & Holmes, as to which, it was alleged, the Tecumseh National Bank was liable. As requested, we have undertaken to determine as to this liability upon consideration of the evidence and shall, therefore, forbear a review of the pleadings.

There is no question made that the corporation known by the name of Russell & Holmes was indebted to Anna B. Saunders as claimed, upon two certificates of deposit, one of which was for \$150, dated June 11, 1889, the other for \$250, dated July 26, 1889. Neither of these was for a fixed time but by each it was provided that if the money was left on deposit for six months it should draw interest at the rate of five per cent per annum. The transfer by Russell & Holmes to the Tecumseh National Bank, which was April 12, 1890, was without the knowledge, much less the assent, of Anna B. Saunders. When she first learned of the existence of the Tecumseh National Bank it was doing a banking business in the same room and under the management of officers who had managed the banking business of Russell & Holmes. It was shown that by its own procurement the Tecumseh National Bank was advertised from May 30, 1890, until December 3, 1892, in a newspaper published at Tecumseh, as a successor of the bank of Russell & Holmes. As was pointed out in *Austin v. Tecumseh Nat. Bank*, 49 Neb., 412, the inference to be drawn from the successorship of one bank to another is controlled by the circumstances of such transfer. As has already been indicated, the defendant in error was not a party to this transfer and in no way sanctioned it, so that her rights are to be entirely governed by the inferences proper to be drawn from the circumstances attendant upon and constituting the transfer

between these two banking institutions. Before this transfer there had been deposited with Russell & Holmes the sum of \$25,000 to be used in buying bonds as a basis of issue for the proposed national bank and to defray its other necessary expenses. When the transfer took place this amount was transferred to the credit of the Tecumseh National Bank, and of the \$28,740 cash held by Russell & Holmes, \$14,225.33 was likewise transferred. The association of Russell & Holmes, just previous to the transfer, had loans, discounts, warrants, and orders to the amount of \$139,825.15, of which there was turned over to the Tecumseh National Bank when it began business on April 14, 1890, \$48,155.53 in amount, leaving in the possession of Russell & Holmes bills receivable represented by the difference between the above items. Of individual deposits owing by Russell & Holmes, the Tecumseh National Bank assumed payment of \$59,763.12. The difference between the amount assumed by the Tecumseh National Bank, \$59,763.12, and the cash and bills receivable turned over was \$3,717.74, as to which there was such evidence as to show that it was provided for, but not evidence of a sufficiently exact nature to enable us to state with precision how this was done.

The capital stock of the Tecumseh National Bank was \$50,000, of which \$20,000 in par value was issued to Charles A. Holmes and James D. Russell. This was paid for out of funds and property of the bank of Russell & Holmes. At the organization of the Tecumseh National Bank Charles A. Holmes and James D. Russell paid in cash fifty per cent of their subscriptions. The balance was paid afterward, as needed, largely by the conversion of personal and real property. Of the latter class of property, subsequently, the bank building of Russell & Holmes was turned in to the Tecumseh National Bank at a valuation of \$8,500. How these individuals became the owners of this building there was no question made either by the pleadings or the evidence. There was no objection that this valuation was unfair and, for our

present purpose, it must be assumed to be just. Of the \$20,000 worth of stock subscribed for by James D. Russell and Charles A. Holmes there was, therefor, paid in cash \$10,000 at the time of the organization of the bank, and afterwards, \$8,500 in real property. This accounts for within fifteen hundred dollars of their subscriptions, and as the association of Russell & Holmes had retained bills receivable to the amount in par value of over \$91,000, it is not difficult to believe that this balance might have been paid as required. In a general way it was shown by the testimony of Charles A. Holmes that Russell & Holmes transferred to the Tecumseh National Bank, notes, other than those above referred to, after the last named bank had commenced business, but it was also shown by other evidence that these notes in each instance were paid for at the times when they were discounted. There was also testimony that real property of Russell & Holmes had been to the amount in value of \$25,000 turned over to the Tecumseh National Bank as security for debts owing said national bank by Russell & Holmes, not earlier than the month of September, 1891. Of the stock of Charles A. Holmes and James D. Russell in the Tecumseh National Bank, \$1,000 in par value was very soon transferred to Warren H. Holmes. In September, 1891, the holders of this \$20,000 of stock pledged it as collateral security for a loan made them by the First National Bank of Lincoln. Subsequently the bank last named purchased this stock and has since continued to hold it. Of the other \$30,000 stock of the Tecumseh National Bank, some was paid for in cash and some in certificates of deposit which had been issued by Russell & Holmes. The amount of each of these certificates, however, was paid to the National Bank by Russell & Holmes.

From a consideration of all the evidence upon which this case was tried, we are led to the conclusion that there was no proof of an undertaking, express or implied, that the Tecumseh National Bank would pay the indebtedness

of Russell & Holmes. The association last named, when it was succeeded in business, had a good financial reputation, and, with assets which it retained, continued to pay its indebtedness as presented for more than a year after that time. This transfer was April 14, 1890, and there were paid on the certificate of deposit first herein described, \$9 on June 14, 1890, \$56.75 March 28, 1891, June 13, 1891, \$9, being interest to June 11, 1892. On the other certificate of deposit there were the following payments: \$15, interest to July 26, 1890; \$15, interest to July 25, 1891; \$15, interest to July 18, 1892. It is claimed that these, or some of these, payments were made by the Tecumseh National Bank, and that, therefore, it should be held liable as to the balance. It was shown, however, that in almost every instance the payments were made by Russell & Holmes; that that association was winding up its business in the banking room of the Tecumseh National Bank, and when payments were made by that bank for Russell & Holmes, it was because the amount was small and no member of that association was present, and that the amount advanced was speedily replaced by Russell & Holmes in every instance. For more than a year after the Tecumseh National Bank had become its successor the association of Russell & Holmes was regarded as being perfectly solvent, and by the defendant in error was so dealt with. After the lapse of more than three years from the time the Tecumseh National Bank began business it was, by this suit, sought to hold it liable for the debt of its predecessor. While the corporation is the same that began business, the stockholders in the meantime have changed, so that the delay noted will operate to their injury if this action is maintainable. Under such circumstances it devolved upon the plaintiff in error to show that she was entitled to the relief prayed, and in this we think she has entirely failed. The judgment of the district court is therefore

REVERSED.

NORVAL, J.

I dissent. The petition in the court below, in every essential particular, is identical with that in the case of *Eans v. Exchange Bank of Jefferson City*, 79 Mo., 182, which the supreme court of Missouri held, and, I believe, rightly, stated a cause of action. The facts in the record before us, some of which are stated in the majority opinion, fully sustain every material averment contained in the petition, and establish the liability of the defendant bank for plaintiff's demand. The judgment should therefore be affirmed.

STATE OF NEBRASKA, EX REL. E. J. CAREY, v. JOHN F. CORNELL, AUDITOR OF PUBLIC ACCOUNTS.

FILED FEBRUARY 3, 1897. No. 8997.

1. **Statutes: AMENDMENTS: CONSTITUTIONAL LAW.** An act complete in itself is not inimical to the constitutional requirement that no law shall be amended unless the new act contains the section or sections so amended, although such complete act may be repugnant to, or in conflict with, a prior law, not referred to nor in express terms repealed by the later act.
2. ———: ———: **STENOGRAPHERS: COMPENSATION.** The act entitled "An act to amend chapter 13 of the Revised Statutes of 1866, entitled 'Courts,'" approved February 27, 1879 (Session Laws, p. 82), was an act complete in itself, and the provisions therein made for stenographic reporters and their compensation were germane to its purposes.
3. ———: ———: ———: ———. The conclusion reached in *Morgan v. State*, 48 Neb., 798, disapproved, and said case overruled.

ORIGINAL application for *mandamus* to compel the auditor of public accounts to issue a warrant for the salary of relator as stenographer of the seventh judicial district. *Writ allowed.*

N. Z. Snell and J. E. Frick, for relator.

C. J. Smyth, Attorney General, and Ed P. Smith, Deputy Attorney General, contra.

RYAN, C.

This is an original action by the stenographic reporter of the seventh judicial district of this state to compel the auditor of public accounts to issue a warrant in the sum of \$375, for one quarter's salary, under the provisions of an act entitled "An act to amend chapter 13 of the Revised Statutes of 1866, entitled 'Courts'" (Session Laws, 1879, p. 82), approved February 27, 1879. It is insisted by the respondent that section 46 of the act just referred to is unconstitutional, because the said act is amendatory of an act approved February 19, 1877, said last named act not being mentioned in the title of the amendatory act, and that, therefore, the provisions of said act of 1877, which fixed the relator's salary at \$250 per quarter, must govern, rather than section 46 of the amendatory act, which fixes it at \$375 per quarter, as claimed by the relator. The respondent is willing to issue a warrant for \$250, but refuses to issue one for \$375, hence this controversy.

Chapter 13, Revised Statutes of 1866, entitled "Courts," made general provisions for a supreme court and for district courts in this state. The jurisdiction of the district courts was defined. Provisions were made for clerks and for terms to be held, for records, proceedings, and other like matters. There was, however, no mention of a stenographic reporter. This officer was first provided for in 1875. By the provisions of section 6 of the act approved February 19, 1877, the yearly compensation of this reporter was fixed at \$1,000. By the act entitled "An act to amend chapter 13 of the Revised Statutes of 1866, entitled 'Courts,'" approved February 27, 1879, there was enacted a complete statute providing for district courts, and, among other things, for necessary officers, among whom was a stenographic reporter, to receive an annual salary of \$1,500.

It is contended by the respondent that the case of *Morgan v. State*, 48 Neb., 798, is decisive of the questions now urged by the relator, and, therefore, that the writ of *mandamus* to compel the auditor to issue the warrant for \$375 should be denied. In *Morgan v. State*, *supra*, there was under consideration section 49 of the act above referred to as having been approved February 27, 1879, and it was held that this section was unconstitutional and void, because it was amendatory of section 5 of an existing act approved February 19, 1877; the title of the amendatory act in no way referring to or recognizing the existence of the act of 1877. In this case there is urged the fact that the act of 1879 was a complete act providing for and governing courts, and that, therefore, it was not necessary that in its title there should be mention of acts incidentally affected, as was the act of 1877. In *State v. Moore*, 48 Neb., 870, there was under consideration the applicability of section 11, article 3, of the constitution of this state, which declares that "No law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed." In respect to the constitutional provision just quoted it was said: "This constitutional provision has been frequently before this court for consideration, and it is a rule, well settled, that where an act of the legislature is not complete in itself, but is amendatory of a former law, to which it does not refer, it is within the constitutional inhibition quoted above. In other words, the fundamental law of the state requires all the parts of an amended law to be incorporated in the act, and the old law so amended to be repealed. If said constitutional provision is disregarded or not complied with in the amendment of a prior act the new law is void. (*Smails v. White*, 4 Neb., 353; *Ryan v. State*, 5 Neb., 276; *Lancaster County v. Hoagland*, 8 Neb., 38; *Sovereign v. State*, 7 Neb., 409; *In re House Roll* 284, 31 Neb., 505; *Stricklett v. State*, 31 Neb., 674; *City of South Omaha v. Taxpayers' League*, 42 Neb., 671.) It is also firmly established in this state, by

a long line of decisions, that an act complete in itself is not inimical to said constitutional provision, although such act may be repugnant to, or in conflict with, a prior law, which is not referred to nor in express terms repealed by the later act. In such case the earlier statute will be construed to be repealed by implication. (*Smails v. White*, 4 Neb., 353; *Jones v. Davis*, 6 Neb., 33; *State v. Maccaig*, 8 Neb., 215; *State v. Whittemore*, 12 Neb., 252; *State v. Page*, 12 Neb., 386; *State v. Ream*, 16 Neb., 681; *Ballou v. Black*, 17 Neb., 389; *Herold v. State*, 21 Neb., 50; *State v. Arnold*, 31 Neb., 75; *Brome v. Cuming County*, 31 Neb., 362; *State v. Benton*, 33 Neb., 825; *State v. Bemis*, 45 Neb., 724.)" In *Omaha Real Estate & Trust Co. v. Kragscow*, 47 Neb., 592, a repeal by implication by reason of inconsistent statutory provisions was held to have resulted between irreconcilable sections of the same statute. In *State v. City of Kearney*, 49 Neb., 325, it was pointed out that in several cases this court had held that the constitutional provision under consideration was applicable to amended subdivisions of a section equally with an entire section. In *Henry v. Ward*, 49 Neb., 392, the principle last above enunciated received a practical application to a condition of legislation very similar to that involved in the present case. To demonstrate this resemblance in point of fact, the following language from the case just cited is quoted: "Section 46, chapter 78, Compiled Statutes, being a portion of the road law of 1879 (Session Laws, 1879, p. 120), provides as follows: 'The section lines are hereby declared to be public roads in each county in this state, and the county board of such county may, whenever the public good requires it, open such roads without any preliminary survey and cause them to be worked in the same manner as other public roads.' * * * In 1867 there was passed an act (Session Laws, 1867, p. 45) providing, among other things, that all roads located in compliance with the laws of this state are declared open roads. * * * The act of 1873 provided that 'section lines be, and are hereby de-

clared to be, public roads and highways' in certain counties named. * * By an act of 1875 (Session Laws, 1875, p. 114, sec. 1) 'all roads, or parts of roads, located and established in this state, except such as are located on section lines, that shall not be worked or traveled for a period of six years from the location [of] said road or roads, the same shall be, and are hereby, declared vacated.' In 1879 there was passed (Session Laws, 1879, p. 120) 'An act to amend chapter 47 of the Revised Statutes of 1866, entitled "Roads."' This is our present road law and contains section 46 above quoted. The argument on behalf of the defendant is that this act did not operate to repeal the acts of 1873 and 1875, and did not vacate any roads established under the act of 1873, notwithstanding section 3 of this act, which provides that 'all roads within the state which have been laid out in pursuance of any law of this state or of the territory of Nebraska, and which have not been vacated in pursuance of the law, are hereby declared to be public roads; provided, that all roads that have not been used within five years shall be deemed vacated.' The evidence is undisputed that this road was not used prior to 1884. * * * We think this earlier legislation (of 1867, 1873), whatever may have been its effect, was superseded by the act of 1879. It is true that the act of 1879 was, in form and in title, an act to amend chapter 47 of the Revised Statutes of 1866, and did not contain or repeal the acts of 1867 or of 1873. Nor did it in terms repeal the act of 1875, which vacated all roads except section line roads for non-user. But chapter 47 of the Revised Statutes of 1866 was a general statute, covering the whole subject of roads and embracing all the legislation then existing. Under the title of an act to amend that chapter it was, therefore, competent for the legislature to include any subject germane to the provisions of the act amended; that is, relating to the general subject of location, opening, maintenance, and vacation of highways within the state. The act of 1879 repeated in the same terms a large portion of chapter 47,

Revised Statutes; and it formed a complete law by itself on the subject of highways." From this line of reasoning it is clear that it was within the constitutional power of the legislature to amend chapter 13 of the Revised Statutes of 1866, entitled "Courts," by substitution therefor of an act on the same subject, complete within itself, and that, therefore, the said act of 1879 was valid.

The only questions remaining to be determined are whether or not the incorporation into the substituted statute of a provision for stenographic reporters, and for the compensation to be allowed such reporters, was germane to the subject-matter of such legislation. In *Martin v. Tyler*, 60 N. W. Rep., 392, the supreme court of North Dakota had under consideration an act entitled "An act to provide for establishing, constructing, and maintaining drains in this state." It was contended that the provisions of this act violated that part of the constitution of that state which provided that "No bill shall embrace more than one subject, which shall be expressed in its title." The provisions of the statute called in question were for the creation of a special drainage commission, and vesting it with powers to act; the levying of special assessments to pay the costs of constructing drains; the providing for the issuance of bonds and of a sinking fund to pay the same, and the repealing of certain sections of existing statutes. In respect to the objections noted that court said: "The title to the act in question is very broad; 'An act to provide for the establishing, constructing, and maintaining drains in this state.' It covers the entire subject. Whatever means and instrumentalities are necessary or usual and proper for effectuating the purposes of the act may be provided in the act. The objections go only to the means and instrumentalities. * * * It (the question here) is not what power passes by implication, but what power may be expressly granted under a title authorizing internal improvements. We think authority to pay for such improvements in some manner other than the ordinary taxation, particularly when, as

in this case, the limit of ordinary taxation might be totally inadequate to meet the expense, is entirely germane to the title, and the issuance of bonds is, perhaps, the most common means known to the law for meeting such expenses." It might be that this court would not care to extend the principle under consideration as far as above indicated, but this is not necessary for our present purpose, which is simply to illustrate the rule of construction applicable to the facts of the case at bar. In *Simon v. Northup*, 40 Pac. Rep., 560, the supreme court of Oregon was considering an act of which the subject, or general object, as expressed in the title, was the acquisition, control, and management of certain specified bridges and ferries across the Willamette river at Portland, and the details by which these purposes were to be accomplished. Section 20, article 4, of the constitution of Oregon declares: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." In the consideration of the objects above indicated it was said: "But it is clearly stated in the title that one of the purposes of the act is to require the county court of Multnomah county 'to assume the management, control, and supervision of such bridges and ferries,' and this is certainly broad enough to sustain a provision requiring the county to provide the funds with which to pay the expenses of such management, control, and supervision, and such provision is germane to, and properly connected with, the subject expressed in the title, and valid." In *Town of Abingdon v. Cabeen*, 106 Ill., 200, it was held that the powers conferred upon townships by the act to subscribe for the capital of, or make donations to, a railroad company; to provide for election; to decide whether such subscriptions or donations should be made; for taxation for the payment of the same if voted, and for the issue of bonds, were sufficiently indicated by the title, which was "An act to incorporate the Dickson & Quincy R. R. Company," to comply with the constitutional provision that "No pri-

vate or local law which may be passed by the general assembly shall include more than one subject, and that shall be embraced in the title." In the delivery of the opinion of the court by Justice Dickey he said: "The title adopted being sufficient to apprise the legislators, fairly, of the general subject-matter of the act, all provisions therein fairly related to that general subject, and designed to conduce to the building of the road named, must, in the light of previous decisions of this court, be held to be fairly embraced in the title adopted." There were cited and analyzed several cases previously decided by the supreme court of Illinois upon substantially the same state of facts as that above considered, and the result in each instance supported the conclusion announced by Justice Dickey. The case just cited was followed by the same court in *Hutchinson v. Self*, 39 N. E. Rep. [Ill.], 27. The first paragraph of the syllabus of *Commonwealth v. Lloyd*, 35 Atl. Rep., 816, which correctly reflects the holding of the supreme court of Pennsylvania, is in this language: "Act March 16, 1872, entitled 'An act relating to the county commissioners of Cambria county,' provides (section 1) that the commissioners shall assemble at a certain date in each year for the purpose of organization, and that at said meeting each member shall produce his certificate of election. Section 2 fixes the salary of each commissioner at \$400 per annum. Section 3 empowers said commissioners to employ a competent clerk, whose compensation shall not exceed \$600 per annum. *Held*, That said act does not violate the constitutional provision that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title." The supreme court in express terms approved the opinion which had been filed by the superior court, from which the case had come for review. In this opinion we find this language: "The second section gives the commissioners, each, compensation as a right to which they are entitled for services rendered the county in the discharge of their duties, and their compensation

is fixed at \$400 per annum. We have said that the title clearly indicates any provision in the body of the act touching the rights, duties, and powers of the commissioners; and there is no right more thoroughly understood by all the people, as inevitably incident to an office, than the right to receive fair compensation for the performance of the duties thereof. By the third section the commissioners are empowered to employ a clerk for their assistance, and to pay him a salary, within certain limits, for his services. From the very nature of the duties to be performed by the county commissioners, a clerk to keep a correct record of their proceedings and the books pertaining to the office is a necessary incident thereto, and from the first organization of counties in this commonwealth to the present time persons peculiarly qualified have been employed and paid as commissioners' clerks; and it requires no stretch of the imagination on the part of any citizen or taxpayer to understand and take notice that the title of an act relative to county commissioners might and would include the right of such commissioners to employ and fix the salary of a clerk. We repeat that the title of this act is all-sufficient to give notice of any legislation properly pertaining to the rights, duties, and powers of the county commissioners of Cambria county, and there is nothing in the body of the act that does not pertain to such rights, duties, and powers; and instead of being misleading, the title is germane to every subject mentioned in the body of the act, and the entire act pertains to but one subject."

It is hardly requisite that we should enter into a detailed analysis of the above cases to illustrate what from them appears clear to us, and that is that the title, "An act to amend chapter 13 of the Revised Statutes of 1866, entitled 'Courts' (Session Laws, 1879, p. 82), was broad enough to admit of provision being made in the act for a stenographic reporter for each district court, and to provide for his compensation. The act just referred to, as we have already stated, was an act complete in itself

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upon the subject of courts, and the provision for the appointment of a stenographic reporter was just as germane as was the requirement that there should be elected a clerk or appointed a bailiff, and, as shown by the above cases, it was proper that the compensation of such reporter should be fixed by the provisions of the act providing for his appointment. It has already been noted that the effect of the enactment of the general statute in question, in 1879, was to repeal the special provisions of the act of 1877, entitled "An act to provide stenographic reporters for the district courts, and to repeal an act entitled 'An act to provide for short-hand reporters in the district courts,' approved February 9, 1875." In the case of *Morgan v. State*, 48 Neb., 798, the opinion was prepared upon the line of argument pursued by the attorney general, in the absence of an argument in reply thereto. Now, for the first time, there are presented the considerations which we have just discussed, leading us to the conclusions already indicated. The result reached in *Morgan v. State*, *supra*, was unavoidable on the line which was followed; and said case, holding that section 49 of an act to amend chapter 13, Revised Statutes of 1866, entitled "Courts," passed and approved February 27, 1879, is unconstitutional and void, is overruled. The writ will issue as prayed.

WRIT ALLOWED.

DOUGLAS COUNTY V. J. H. TAYLOR.

FILED FEBRUARY 3, 1897. No. 7045.

- 1. Eminent Domain:** PORTION OF STREET OUTSIDE OF CITY: GRADE: DAMAGES: CLAIMS: LIABILITY OF COUNTY. Taylor owned a tract of land lying within the limits of the city of Omaha, in Douglas county. On the north side of his land was a public thoroughfare. The south half of this thoroughfare in front of Taylor's land was in the limits of the city of Omaha. The north half of the thoroughfare in front of Taylor's land was without the limits of the

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city of Omaha, but within Douglas county. The county made a cut and constructed a fill in the thoroughfare north of Taylor's land the entire width of the street. Taylor sued the county for damages, alleging that by the construction of the improvement in the street in front of his property the latter had been depreciated in value; that in constructing said improvement the county had dug and carried away portions of his land lying outside the limits of said street; had torn down his fences and cut down his trees and used the same in the construction of said improvement; and had appropriated a portion of his land lying outside the limits of said thoroughfare by constructing thereon the base of said fill. *Held*, (1) Construing sections 1, 33, and 1a, chapter 78, Compiled Statutes, that it was the duty of the county to work and maintain the north half, and the duty of the city of Omaha to work and maintain the south half of said street in front of plaintiff's property, but that the county and city had concurrent jurisdiction or authority to construct the cut and fill in the street in front of Taylor's property, and that, therefore, the acts of the county in the premises were not *ultra vires*; (2) that it was immaterial what technical name might be given to Taylor's action; for whether his petition stated a cause of action *ex delicto* or *ex contractu*, the averments thereof, if true, established the fact that his property had been taken and damaged for public use, and that by virtue of section 21 of the bill of rights (Constitution, art. 1, sec. 21) he was entitled to compensation therefor; (3) that no legislative enactment was necessary to enable Taylor to maintain his action; (4) that the district court had original jurisdiction to try the claim of Taylor against the county; that it was not a claim required by section 37, article 1, chapter 18, Compiled Statutes, to be filed with the county clerk of said Douglas county and passed upon by its board of commissioners; (4) the word "claims" in said section 37 has reference only to claims originating in contract, express or implied, between the claimant and the county.

2. ———: STREETS: DAMAGES: VERDICT FOR PLAINTIFF. Evidence examined, and *held* to sustain the finding of the district court.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J. *Affirmed*.

The facts are stated by the commissioner.

J. L. Kaley and A. C. Troup, for plaintiff in error:

The action is one sounding in tort for which a county is not liable unless made so by express provision of statute. (*Russell v. Men of Devon*, 2 T. R. [Eng.], 671; *Wehm v. Gage County*, 5 Neb., 494; *Woods v. Colfax County*, 10 Neb.,

552; *Hamilton County v. Mighels*, 7 O. St., 109; *Crowell v. Sonoma County*, 25 Cal., 313; *Schuyler County v. Mercer County*, 4 Gilm. [Ill.], 20; *County of Rock Island v. Steele*, 31 Ill., 543; *Granger v. Pulaski County*, 26 Ark., 37; *Monroe County v. Flint*, 6 S. E. Rep. [Ga.], 173; *Ward v. Appling County*, 6 S. E. Rep. [Ga.], 914; *White Star Line Steamboat Co. v. Gordon County*, 7 S. E. Rep. [Ga.], 231; *Dillon, Municipal Corporations*, secs. 963, 999; 4 Am. & Eng. Ency. of Law, 364.)

If plaintiff had any legal claim against the county it was his duty to file the same with the county board before bringing suit. (Compiled Statutes, ch. 18, sec. 37; *Dixon County v. Barnes*, 13 Neb., 295; *Brown v. Otoe County*, 6 Neb., 111; *State v. Buffalo County*, 6 Neb., 454; *Yarapai County v. O'Neill*, 29 Pac. Rep. [Ore.], 432; *Luzerne County v. Day*, 23 Pa. St., 141; *Lawrence County v. City of Brookhaven*, 51 Miss., 68; *Alden v. Alameda County*, 43 Cal., 272; *Shepard v. Commissioners of Darke County*, 8 O. St., 354; *State v. Commissioners of Hamilton County*, 26 O. St., 369; *Richardson County v. Hull*, 24 Neb., 536; *Fuller v. Colfax County*, 33 Neb., 716; *Marsh v. Benton County*, 39 N. W. Rep. [Ia.], 713; *Maddox v. County of Randolph*, 65 Ga., 216; *Powder River Cattle Co. v. Custer County*, 22 Pac. Rep. [Mon.], 383; *Barbour County v. Horn*, 41 Ala., 114; *Norwood v. Gonzales*, 14 S. W. Rep. [Tex.], 1057; *McCann v. Sierra County*, 7 Cal., 121; *Hohman v. County of Comal*, 34 Tex., 36.)

If the allegations of the petition are true, the acts complained of were without the jurisdiction of the county commissioners, and therefore void; and ratification by the county would be impossible. (*Zottman v. City and County of San Francisco*, 20 Cal., 97; *Board of Supervisors of Jefferson County v. Arrighi*, 54 Miss., 668; *Newberry v. Fox*, 33 N. W. Rep. [Minn.], 333; *Lancaster County v. Fulton*, 18 Atl. Rep. [Pa.], 384; *Dillon, Municipal Corporations* [3d ed.], sec. 465.)

County commissioners have only such powers as are expressly granted by statute, or are essential to the due ex-

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ercise of such powers. (*Hamlin v. Meadville*, 6 Neb., 227; *Walsh v. Rogers*, 15 Neb., 311; *State v. Lincoln County*, 18 Neb., 283; *Browning v. Owen County*, 44 Ind., 11; *Wheeler v. Wayne County*, 24 N. E. Rep. [Ill.], 625; *Daley v. City and County of San Francisco*, 13 Pac. Rep. [Cal.], 321; *Rowland v. City of Gallatin*, 75 Mo., 134.)

A county cannot be bound by any acts of its commissioners not regularly enacted by the board. (*Phelan v. San Francisco*, 6 Cal., 532; *Merrick County v. Batty*, 10 Neb., 176.)

A county can be bound by its board upon a contract, only by an affirmative act within the scope of its authority, evidenced by an entry on its minutes. (*Bridges v. Clay County*, 58 Miss., 817; *Crump v. Colfax County*, 52 Miss., 107; *Dennison v. County of St. Louis*, 33 Mo., 168; *Mitchell v. St. Louis County*, 24 Minn., 459; *Murphy v. Napa County*, 20 Cal., 498.)

A contract made by county commissioners, to be binding upon the county, must be made by the board at a regular session. (*Potts v. Henderson*, 2 Ind., 327; *Campbell v. Brackenridge*, 8 Blackf. [Ind.], 471; *County of Eldorado v. Reed*, 11 Cal., 130; *County of La Salle v. Simmons*, 10 Ill., 513; *Gardner v. Dakota County*, 21 Minn., 33; *Linden v. Case*, 46 Cal., 172.)

A county is not chargeable with knowledge possessed by an individual member of a county board. (*Commissioners of Leavenworth County v. Hamlin*, 31 Kan., 105; *Bouton v. Supervisors of McDonough County*, 84 Ill., 384; *Merrill v. Inhabitants of Berkshire*, 11 Pick. [Mass.], 269; *Treichler v. Berks County*, 2 Gr. [Pa.], 445; *Madison County v. Burford*, 93 Ind., 383; *Crawford County v. Clerc*, 4 Chand. [Wis.], 56; *Smith v. Barron County*, 44 Wis., 686; *Stamp v. County of Cass*, 47 Mich., 330; *Dennison v. County of St. Louis*, 33 Mo., 168; *Rice v. Plymouth County*, 43 Ia., 136.)

C. A. Baldwin, G. W. Doane, and Robert W. Patrick,
contra.

RAGAN, C.

Joseph H. Taylor brought this suit in the district court of Douglas county against said county, the individuals composing its board of commissioners, and the city of Omaha, to recover damages which he alleged his real estate had sustained by reason of the grading of a street or highway in front thereof. At the close of the evidence the district court directed a verdict returned in favor of the gentlemen composing the board of commissioners and the city of Omaha, which was done and a judgment entered dismissing them out of the action. The case proceeded to trial against Douglas county and resulted in a verdict and judgment in favor of Taylor, and the county brings the same here for review on error.

1. The first argument is that the petition does not state facts sufficient to constitute a cause of action against Douglas county. The petition alleges, in substance, that in the year 1890 plaintiff was the owner of a small tract of land lying in the western part of the then corporate limits of the city of Omaha, in said Douglas county; that running east and west on the north side of plaintiff's land was a public highway; that prior to 1887 this highway on the north side of plaintiff's land was one of the public roads or highways of Douglas county; that at that time the part of said highway east of plaintiff's land was known as Leavenworth street, in said city of Omaha; that in the year 1887 the western boundary of said city was so changed as to put plaintiff's property and the south half of said highway or street in front thereof within the limits of said city of Omaha, and leave the north half of said street in front of plaintiff's property outside the limits of said city of Omaha, but within the county of Douglas; that in the autumn of 1890 the gentlemen constituting the board of commissioners of said county, "while pretending to act in their official capacity, with a strong hand unlawfully, wrongfully, forcibly, and without any authority of law entered upon plaintiff's land

with horses, mules, men, and machinery," and made a cut and fill in said street in front of plaintiff's property; that said cut began on the eastern boundary of plaintiff's land and extended west 250 feet, was constructed the full width of the street, and was from eight to twelve feet in depth; that the fill began at the west end of the cut made and extended to the western boundary of plaintiff's land, a distance of 600 feet, was constructed the width of the entire street, and from twelve to twenty feet in height; that the said cut and fill so constructed depreciated in value and damaged plaintiff's land; that in the prosecution of said work said workmen dug and carried away a portion of plaintiff's land lying outside the limits of said street, and used and appropriated said earth so dug and carried away towards the construction of said fill; that in making said fill said workmen so constructed it that several feet of the south line of the base thereof rested on the north end of plaintiff's land, lying outside the limits of said street; that in the prosecution of said work said workmen entered upon plaintiff's land, tore down his fences, cut down his trees, and used and appropriated said trees and fences towards the construction of said cut and fill, to the plaintiff's damage.

(a.) The first contention is that since Taylor's land and the south half of the street or highway north thereof were in the limits of the city of Omaha, that it, and it alone, had jurisdiction and authority to work and repair the south half of said street in front of plaintiff's property; that the county had no jurisdiction or authority to work or repair the south half of said street in front of plaintiff's property, and that the act of its commissioners in constructing the grade and cut in the south half of said street was *ultra vires*, was void, and that the county is not bound by their action. The property of Taylor and the south half of the street in front thereof was in the city of Omaha, and because of that fact the city had jurisdiction and control over the south half of said street in front of Taylor's property, and it was the city's duty to work,

grade, and maintain in proper repair and condition for travel said part of said street. (Compiled Statutes, ch. 78, sec. 33.) The north half of said street in front of Taylor's property was outside the limits of the city of Omaha, but in Douglas county. The county, then, had jurisdiction and control over the north half of said street, and it was its duty to work and maintain in proper condition for travel said north half of said street. (Compiled Statutes, ch. 78, sec. 1.) Such were the duties of the county and city, respectively, as to such street in front of plaintiff's property; but section 1a, chapter 78, Compiled Statutes, passed and approved March 30, 1889, provides that the county board of any county in which any city of the metropolitan class is situate is authorized and empowered to aid in the grading, paving, or otherwise improving of any street leading into said city, and within the corporate limits thereof, by providing for the payment of a certain portion of the cost of such labor. A city of the metropolitan class, namely, the city of Omaha, at the time this grading was done was situate in Douglas county. The street in front of plaintiff's property led into said city, and the street, or at least a part of it, was within the corporate limits of said city. As we read this statute, then, Douglas county was authorized to aid in grading this street in front of plaintiff's property, and we do not think that the county is by the statute limited to paying to the city the proportion of the cost of such grading as the county may assume, but that it had authority to use its own agents and machinery in doing such part of the grading as it was authorized by law to pay the cost of. The act of the county, then, in putting the cut and fill in the south half of this street in front of plaintiff's property was not an act outside its jurisdiction. It was an act authorized by law. While the law made it the duty of the county to work and maintain the north half of the street, and made it the duty of the city to work and maintain the south half of the street, it conferred on the county and city a concurrent jurisdiction or authority

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to grade or pave a street such as the one in front of plaintiff's property.

(b.) A second argument under the contention that the petition does not state a cause of action is that the petitioner seeks to recover damages from the county by reason of a tort committed by it, and that an action of tort will not lie against a county in the absence of an express statute authorizing it, and that no such statute exists. To sustain this contention we are cited to *Wehn v. Commissioners of Gage County*, 5 Neb., 494. In that case Gage county had constructed a jail near the residence of Wehn, and he claimed that criminals and drunken men were permitted "to be loose and go at large around said premises, whereby * * * offensive and frightful noises, wild and terrible yells, shrieks, and ravings, vile, profane, obscene, and indecent language and words, noxious and offensive swills and stench were permitted therein, * * * entered the dwelling house and premises of plaintiff nightly and daily and rendered the same unwholesome and uninhabitable, and incommoded and exposed to insult and injury the plaintiff and his family, to his great damage." In other words, it was a suit of Wehn against the county for damages because the latter was maintaining a nuisance, and the court held that the action would not lie. We are also cited by counsel for the county to *Woods v. Commissioners of Colfax County*, 10 Neb., 552. It was held in that case that a county was not liable, in the absence of an express statute, for injuries one had received by the breaking down of a public bridge negligently constructed by authority of the county. But these cases are not in point here, and *Woods v. Commissioners of Colfax County*, at least, is no longer in force since the enactment of section 4, chapter 7, Session Laws of 1889, which made counties liable for damages sustained by any person resulting from a defective highway or bridge. (See, also, *Hollingsworth v. Saunders County*, 36 Neb., 141.) Section 21 of the bill of rights (Constitution, art. 1, sec. 21) provides that the property of no person

shall be taken or damaged for public use without just compensation therefor. Taylor in his petition avers that a part of his property was taken by the county for a public purpose, and that the part of his property not taken was damaged by the construction by the county of the public improvement in front thereof. It is immaterial, then, what technical name may be given to this action. By force of the constitutional provision just quoted the averments of the petition, if true, establish a cause of action in favor of Taylor and against the county. To give effect to this section of the bill of rights no legislative enactment was or is necessary.

(c.) A third argument in support of the contention that the petition does not state a cause of action is that Taylor does not aver therein that he filed his claim for damages with the county clerk of Douglas county, and that it had been passed upon by the county commissioners thereof. To sustain this contention counsel cite us numerous authorities, among which is *Brown v. Commissioners of Otoe County*, 6 Neb., 111. Brown's claim against the county in that case was for publishing the delinquent tax list of the county, and it was held that the jurisdiction of the district court over Brown's cause of action against the county was appellate only; that his claim should have been filed with the county clerk of Otoe county and passed upon by the commissioners thereof in order to invest the district court with jurisdiction. Another case cited is *Board of Commissioners of Dixon County v. Barnes*, 13 Neb., 294. The claim of Barnes against the county was for services which he claimed he had rendered for the county as an attorney in a litigation in which the county was interested, and it was held that such claim must be filed with the county clerk of said Dixon county and passed upon by the commissioners of said county in order to invest the district court with jurisdiction to hear it. *Richardson County v. Hull*, 24 Neb., 536, was an action brought originally in the district court of Richardson county by Hull against the county to recover a sum of money he had

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paid into the county treasury as taxes upon certain land which was not subject to taxation, and it was held that the district court had no original jurisdiction. Such, also, is *Fuller v. Colfax County*, 33 Neb., 716. It is to be observed that in the cases cited the claims considered originated in contracts, express or implied, between the claimants and the counties; or, in other words, they were claims which arose *ex contractu*. *Nance v. City of Falls City*, 16 Neb., 85, was an action brought by an administrator against the city for damages for negligently causing the death of his intestate. At that time section 80, chapter 14, Compiled Statutes, 1885, was in force, and it provided that all claims against a city of the class to which Falls City belonged must be presented in writing to the city council, with a full account of the items, verified by the oath of the claimant or his agent, and that no costs should be recovered against such city in any action brought against it for an unliquidated claim unless such claim had been first so presented to the city council. The administrator did not file his claim for damages with the city council and the district court held that he was liable for the costs of the action. On error proceedings to this court this judgment was reversed, the court holding that the word "claims" used in the statute just quoted referred only to claims *ex contractu*, and not to claims *ex delicto*. To the same effect see the decision in *Village of Ponca v. Crawford*, 18 Neb., 551. In *Hollingsworth v. Saunders County*, 36 Neb., 141, Hollingsworth sued the county for injuries he had received by the falling of a public bridge in said county, and which damages, he alleged, were the result of the negligence of the county in constructing such bridge or in not maintaining it. The county interposed a general demurrer to the petition, and one of the points made was that the petition did not state a cause of action, because Hollingsworth did not aver that he had filed his claim for damages with the county clerk of said Saunders county and had it passed upon by the county authorities of that county, as provided by

section 37, article 1, chapter 18, Compiled Statutes. The district court sustained the demurrer and dismissed the petition. On error proceedings to this court this judgment of the district court was reversed, the court holding that the said section 37 only required claims *ex contractu* to be filed with the county clerk and passed upon by the county commissioners of the county in order to invest the district courts with jurisdiction to try such claims. *Dayton v. City of Lincoln*, 39 Neb., 74, was an action brought by Dayton against the city for damages which he alleged his property had sustained by the change of grade of certain streets on which his property abutted. The city of Lincoln at that time was a city of the first class having more than twenty-five and less than one hundred thousand inhabitants, and governed by chapter 13a, Compiled Statutes. Section 36, article 1, of this chapter provided that all claims against a city must be presented in writing to the city council. It was insisted by the city that the county court, to which the action was originally brought, was without jurisdiction to try the case, because Dayton had not first presented his claim for damages to the city council; but on a proceeding in error to this court the contention of the city in this respect was overruled, the court holding that the section of the statute just quoted did not contemplate the filing of claims for unliquidated damages with the city council. Section 37, article 1, chapter 18, Compiled Statutes, is to the effect that all claims against a county must be filed by the county clerk and presented to and passed upon by the board of county commissioners. We think that the word "claims" in that section refers only to claims originating in contract, express or implied, between the claimant and the county, and that a claim against a county for damages caused to the claimant's property by the county's taking it for public use, or damaging it by the construction of a public improvement, is not such a claim as need be first filed with the county clerk and passed upon by the county authorities; but an action on such a claim may be

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brought, in the first instance, in any court having jurisdiction of the subject-matter. (*City of Chadron v. Glover*, 43 Neb., 732.)

2. It is insisted that the district court erred in giving instructions numbered from 1 to 10, both inclusive, and in refusing to give instructions asked by the county numbered 1 to 7, both inclusive. We have examined the instructions given and refused, and ascertained that the court did not err in giving all the instructions given nor in refusing all the instructions refused; and since the assignment is that it erred in giving all and refusing all the instructions, it will not be further considered.

3. Complaint is made of the action of the trial court in admitting certain evidence on the trial. We have scrutinized the action of the court in this respect and find it without error, and it would serve no useful purpose to give these assignments further attention here.

4. A final argument is that the verdict is not supported by sufficient evidence. We think it is. The contention of Taylor was, and the evidence in his behalf tends to support it, that he had been damaged several thousand dollars by the action of the county in grading the street in front of his property. The contention of the county was, and the evidence in its behalf tended to support it, that Taylor's property had been enhanced in value by the construction in front thereof of a cut sixty-six feet wide, eight to ten feet deep, and two hundred and fifty feet long, and a fill six hundred feet long, sixty-six feet wide, and twelve feet high. The jury weighed this evidence and reached the conclusion that Taylor had been damaged in the sum of \$500. This conclusion is abundantly supported by the evidence. The judgment of the district court is

AFFIRMED.

W. Q. BELL, ADMINISTRATOR, V. ANNA RICE ET AL.

FILED FEBRUARY 3, 1897. No. 7071.

1. **Parent and Child: SERVICES: EVIDENCE.** Generally where a child renders services for a parent, the family relation existing at the time, the law presumes, by reason of the kinship of the parties and such family relation, that such services were gratuitously rendered.
2. ———: ———: ———. Such presumption is not a conclusive one, and the child may recover the value of the services rendered if the evidence shows that they were rendered under such circumstances as to justify the inference of a contract on the part of the parent to pay for them.
3. ———: ———: ———. Whether the evidence warrants such a conclusion is a question for the jury.
4. ———: **CARE OF IMBECILE: COMPENSATION: NECESSARIES.** A stepfather residing in the state of Illinois became an imbecile. No conservator was appointed for him. At the request of those who had charge of his property and business his stepdaughter caused him to be brought to the home of herself and husband in the state of Nebraska, where he remained until his death, some ninety weeks afterwards. During this time the stepdaughter furnished him boarding, lodging, medicine and medical attendance, and such care as his demented condition required. For these services she filed a claim against his estate. *Held*, That the services rendered to the stepfather were necessities for which his estate was liable.
5. **Statute of Limitations: REVIEW.** The defense of the statute of limitations is a meritorious one, but one that may be waived; and if it is not insisted upon in some manner in the trial court it will not be considered here for the first time.
6. **Gift of Money to Father From Child: SETTLEMENT OF ESTATE: INTEREST.** A brother gave to his sister his note for \$1,000. The brother died and the note was filed and allowed as a claim against his estate, and his administratrix, on settling the estate, paid said claim in full to the father of her intestate's sister. The daughter was at the time living with her father, and the money was paid to and retained by him with her knowledge and consent, without any agreement on his part to pay interest for the use of said money or to repay it at any particular time. After the father's death the daughter filed a claim against his estate for this money. *Held*, (1) That the evidence warranted the conclusion that the money was not a gift by the daughter to the father; (2) that it was not money which the father was entitled to appropriate to himself by reason of the relation existing between himself and daughter;

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(3) that the transaction was in the nature of a gratuitous loan to the father; (4) that the money was payable to the daughter on demand; (5) that her father's estate was liable to her for the claim, but as she made no demand for its payment during the lifetime of her father, her claim should only draw interest from the date she filed it against the estate.

ERROR from the district court of Lancaster county.
Tried below before STRODE, J. *Modified.*

Abbott, Selleck & Lane, for plaintiff in error:

The estate of a parent is not chargeable for either services rendered by, or for money received from, a child or stepchild, unless it is shown that there was an express promise made by the parent to pay for such services or to refund such money. (*Woods v. Land*, 30 Mo. App., 176; *Barhite's Appeal*, 126 Pa. St., 404; *Havens v. Havens*, 3 N. Y. Supp., 219; *Wright v. Senn's Estate*, 48 N. W. Rep. [Mich.], 545; *Harris v. Currier*, 44 Vt., 468; *Allen v. Allen*, 60 Mich., 635; *O'Kelley v. Faulkner*, 17 S. E. Rep. [Ga.], 847; *Puterbaugh v. Puterbaugh*, 34 N. E. Rep. [Ind.], 611; *Ellis v. Cary*, 42 N. W. Rep. [Wis.], 252; *Smith v. Rogers*, 24 Kan., 140; *Wells v. Perkins*, 43 Wis., 164; *Keegan v. Malone*, 17 N. W. Rep. [Ia.], 461; *Tyler v. Burrington*, 39 Wis., 376; *James v. Gillen*, 30 N. E. Rep. [Ind.], 7.)

W. E. Stewart and Tibbets Bros., Morey & Ferris, contra.

References: *Smith v. Meyers*, 19 Mo., 433; *Hall v. Hall*, 44 N. H., 293; *Adams v. Adams*, 23 Ind., 50.

RAGAN, C.

In the county court of Lancaster county, sitting as a court of probate, Sophia Mills and Anna Rice each filed a claim against the estate of Thomas H. Rice, deceased. From the judgment of the county court allowing these claims the administrator of the estate refused to appeal, whereupon certain heirs of the estate, in pursuance of the provisions of the statute, appealed from the judgments of the county court to the district court. The two claims

were there tried without pleadings. They were tried together to the court without a jury. The district court allowed the claims of Sophia Mills and Anna Rice against the said estate, and said heirs have filed here a petition in error to review the action of the district court.

1. We will first direct our attention to the claim of Sophia Mills. She claimed that the estate was indebted to her in the sum of \$1,350 for boarding, lodging, and caring for the deceased for the ninety weeks immediately preceding his death, on which claim she admitted that she had been paid \$862.91, leaving a balance due her of \$867.19. By the judgment of the district court she was awarded \$311.95. The evidence shows that Mrs. Mills in 1887 resided with her husband in Waverly, Nebraska; that she was the stepdaughter of the deceased, who at that time resided in Monmouth, Illinois; that in September, 1887, the deceased became an imbecile. The management of his affairs and estate was taken charge of by certain of his friends in Illinois, though no conservator or guardian was appointed for him. About this time, at the suggestion of those having charge of the estate and the affairs of the deceased, Mrs. Mills caused him to be brought to her house in Nebraska, where he remained until he died, some ninety weeks afterwards. During this time Mrs. Mills boarded, lodged, and cared for him, and furnished him medicine and medical attendance. It was necessary, owing to his lack of the use of his mental faculties, to keep a constant watch upon him to prevent his straying away. He had lost power to control and direct the functions of his body and had to be waited upon like an infant; and the evidence shows that the services of Mrs. Mills in the premises were reasonably worth from \$10 to \$30 per week. It is urged against the judgment of the district court that its finding is unsupported by sufficient evidence. It is first said that the evidence does not warrant the amount awarded Mrs. Mills. Adding the amount of money received by her from the estate of the deceased during his lifetime to the amount awarded

her by the court, we have a total of \$1,174, which Mrs. Mills has received for her services in the premises. This amount the evidence justifies. But it is said that the evidence does not disclose an express promise on the part of the deceased to pay Mrs. Mills for her services, since she was his stepdaughter and the deceased lived with her in her family; that a family relation existed between them, and that the presumption is that the services rendered by Mrs. Mills were gratuitously rendered because of the relation existing between herself and the deceased. But this evidence does not bring Mrs. Mills' case within the rule that where services are rendered by a child for a parent, the presumption is such services were rendered gratuitously because of the relation existing between the parties. The deceased was not a visitor at the house of Mrs. Mills, nor was he at her house because he had been invited by her to come there and make it his home. If because of the relationship of Mrs. Mills to the deceased the law presumes that the services rendered by her were gratuitously rendered, still this was not a conclusive presumption; and we think that the services of Mrs. Mills were rendered under such circumstances as to overthrow this presumption and justify the application to this case of the general rule that where services are rendered by one party for another, and knowingly accepted by him, the law will imply a promise on his part to pay what such services are reasonably worth. (*Smith v. Myers*, 19 Mo., 433.) In *Koch v. Hebel*, 32 Mo. App., 103, a daughter filed a claim against her father's estate for services rendered by her for him in his lifetime. The evidence showed that while the daughter was away from home working for herself her mother was taken ill; that the daughter then returned to the home of her parents, but whether at their request did not appear, and remained with and cared for them until the death of the survivor, and that her father had on certain occasions spoken of compensating her for these services. The court held that because of the family relationship

existing between the claimant and the deceased the law presumed that the daughter had rendered the services she did gratuitously, but nevertheless, it was for the jury to say from this evidence whether the services were in fact rendered gratuitously by the daughter, or under such circumstances as to justify the inference of an actual contract of hiring the daughter by the deceased. To the same effect see *James v. Gillen*, 30 N. E. Rep. [Ind.], 7. In *Davidson v. Westchester Gas Light Co.*, 2 N. E. Rep. [N. Y.], 892, it was held that an implied promise to pay for services would be held to exist where the services were rendered under such circumstances as justified the party rendering them in entertaining reasonable expectation of their payment by the party soliciting the performance. In *Adams v. Adams*, 23 Ind., 50, it was held that where a child continues with a parent after being of age the presumption is that no wages are to be paid; but a contract to pay a reasonable compensation might be inferred from circumstances tending to rebut such presumption. In *O'Kelly v. Faulkner*, 17 S. E. Rep. [Ga.], 847, it was held that in order to authorize a recovery by a son against the estate of his deceased father for services in the nature of care and attention to the latter while old and infirm, it must affirmatively appear either that the services were rendered under an express contract that the son was to be paid for them, or, the surrounding circumstances must plainly indicate that it was the intention of both parties that compensation should be made and negative the presumption of law that by reason of the family relation the services were gratuitously rendered. In *Byers v. Thompson*, 66 Ill., 421, a son placed a house on his father's land in the lifetime of the latter. After the father's death the son filed a claim against his estate to recover the value of the house. The court held that the son's right to recover depended upon whether he expected to be paid therefor at the time he placed the house on the farm, and the father expected to pay him, and that this must be determined from all the evidence in the case;

and the court expressly held that it was not necessary to enable the son to recover that the proofs should show an express contract with his father to pay for the house. We conclude, therefore: (1) That where a child renders services for a parent, the family relation existing at the time, the law presumes by reason of the kinship of the parties and such family relation that such services were gratuitously rendered; (2) that such presumption is not conclusive, and that the child may recover the value of the services rendered if the evidence shows that they were rendered under such circumstances as to justify the inference of a contract on the part of the parent to pay for them; (3) and whether the evidence warrants such conclusion is for the jury. (*Hill v. Hill*, 23 N. E. Rep. [Ind.], 87.) In the case at bar the deceased was incapable of caring for himself. The services rendered for him by Mrs. Mills, the boarding, lodging, medicine, medical attendance, and clothing furnished to him by her were necessities; and though there was no express contract on his part to pay for these necessities, and, if the evidence was insufficient to justify the inference of a presumption on the part of the deceased to pay for the services rendered, still the judgment of the district court was right. (*Reando v. Mosplay*, 2 S. W. Rep. [Mo.], 405.) The judgment of the district court in favor of Mrs. Mills is affirmed.

2. The district court by its judgment awarded Anna Rice a claim against the estate in the sum of \$1,686.50. Her contention seems to have been that the estate was indebted to her for various sums of money which she had loaned the deceased in his lifetime, or which had come into his hands for her use, and it was for these sums of money and interest thereon that she based her claim. It is evident that the award made by the district court consists of an item of \$500 and an item of \$555.33, and interest on those items. No evidence was given or offered on the trial of any other items embraced in the claim of Anna Rice, and our consideration of the case

will be directed entirely to the question whether the district court was right in allowing the amount of these two items and interest thereon. It is first insisted that the judgment is erroneous because not supported by sufficient evidence. The evidence is somewhat unsatisfactory, and, as is usual in this class of cases, very meager, but we think it sustains the finding of the court that the estate of the deceased was indebted to Miss Rice in the sum of the two items of \$500 and \$555.33, and interest thereon. This evidence tends to show that Anna Rice was the daughter of the deceased, and in March, 1883, had a brother living, named William A. Rice. On the 26th of this month William executed his promissory note, payable to the order of Anna, for \$1,000, due one year after date. Early in the year 1884 William died intestate in the state of Missouri and his widow was appointed his administratrix. At the time of William's death the note to Anna remained unpaid, as also certain other notes which William owed his father. The notes belonging to Anna's father and the note belonging to herself were sent to Missouri by a messenger, with instructions to file them against the estate of William Rice. The notes were so filed against the estate of William Rice, but by mistake were all filed and allowed as notes of Anna's father. When the administratrix of William Rice was ready to settle she discovered this fact, and then caused Anna to indorse her own note to her father. The amount of Anna's note allowed against her brother's estate was \$1,055.33, and on the 3d of October, 1884, \$500 of this money was by William's administratrix placed to the credit of Anna's father in a bank at Monmouth, Illinois, with which he did business; and on the 10th of February, 1885, \$555.33, being the remainder of Anna's note, was placed to her father's credit in the Monmouth bank, with her knowledge and consent. Anna and her father at that time resided in the state of Illinois and he was then transacting business. About September, 1887, Anna's father lost the use of his mental faculties and he was brought to

the state of Nebraska and cared for by his stepdaughter until his death in 1889. It seems, also, that Anna came with him to the state of Nebraska and remained here until his death. Anna made no request of her father during his life to repay her the money put into his account by the administratrix of his deceased son, William. No express agreement existed between them that he should repay this money, nor that he should pay interest upon it. No attempt was made by the estate to show that this money, or any part of it, had ever been repaid to Anna. It is inferable from the evidence that the \$1,000 note given to Anna by her brother was money that his father had put in his hands or loaned to him, and which was intended for Anna as a share or a part of her father's estate. This evidence then shows that Anna possessed in her own right \$1,055.33 of money; that this money, with her knowledge and consent, went into the hands of her father; but we do not think that the money of Anna went into her father's possession under such circumstances as to warrant the conclusion that it was a gift by Anna to her father. It was not money that she had earned when a minor, and to which by reason thereof he might have been entitled; nor was it money which she had given him to be used for the support of himself and the family. Technically speaking, the father did not hold this money as bailee, and perhaps he was not a trustee of an express trust. The placing of this money in the father's possession by Anna was in the nature of a gratuitous loan to him; a "*commodatum*," as it is sometimes called.

3. A second argument is that the claim of Anna for this money was barred by the statute of limitations. We will not consider this point, because not made in the court below. Contestants in the district court, neither by demurrer nor answer, raised any question as to the statute of limitations, nor did they object to the introduction of evidence in support of claims upon that ground. The statute of limitations is a meritorious de-

fense, but it is one that may be waived, and if it is not insisted upon in some manner in the trial court it will not be considered here for the first time. (*Scroggin v. National Lumber Co.*, 41 Neb., 195, and cases there cited.)

4. A final contention is that the amount of recovery permitted by the court is too large. We think this contention correct. The court allowed the two items mentioned above, with interest on the same from the date that the money went into the hands of the decedent. We think this was wrong. This money being in the hands of Anna's father with her knowledge and consent, she having loaned it to him gratuitously,—that is, without any agreement upon his part to pay interest for the use of it,—it was payable to her only on demand. The first and only demand she ever made for this money was when she filed her claim against the estate for it on the 12th day of March, 1890, and from that date, we think, the interest should have been computed. (*Duncan v. Magette*, 25 Tex., 245; *Morse v. Rice*, 36 Neb., 212.) The judgment is accordingly \$385.02 too large. Miss Rice will have permission to remit that amount from the judgment within thirty days, and if she does so the judgment of the district court in her favor for \$1,301.48 will be affirmed; the costs of this proceeding in this court to be taxed to Anna Rice.

JUDGMENT ACCORDINGLY.

UNION PACIFIC RAILROAD COMPANY V. PATRICK DOYLE.

FILED FEBRUARY 3, 1897. No. 7070.

1. **Master and Servant: VICE-PRINCIPAL: RAILROAD COMPANIES: INJURY TO EMPLOYEE.** The defendant in error was a section hand in the employ of the railway company. He and others were hired by one Cochran, a section boss in the employ of the railway company, and they were under his control and direction while working on their section of the railway, and Cochran had authority to discharge the men hired by him. Cochran and his section men were

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put to work on a gravel train of the railway company. This gravel train, the crew thereof, and all the men working thereon, including Cochran and his section men, while at work with the gravel train, were under the control, direction, and subject to the orders of a foreman named Forrest. Forrest was not invested with authority to hire or discharge the defendant in error. The defendant in error, while working on this gravel train, was injured, as he alleged, through the negligence of an order given by Forrest, and sued the railway company for damages. *Held*, That as to the defendant in error, Forrest was not a fellow-servant, but a vice-principal.

2. ———: ———. Whether one of several employes of the same master is a vice-principal as to his co-employes, or whether all are fellow-servants, is not always a question of fact, nor always a question of law. Generally it is a mixed question of law and fact, and to be determined in any case by the particular facts and circumstances in evidence in the case in which it is presented.
3. ———: ———. The fact that one employe is vested with authority to hire and discharge a co-employe is not conclusive evidence that as to such co-employe he is a vice-principal; nor does it follow that one employe is not a vice-principal as to his co-employes because not vested with the authority to hire and discharge them.
4. ———: ———: EVIDENCE. The most satisfactory evidence that one is, as to his co-employes, a vice-principal is that his co-employes are under his supervision, his control, and subject to his orders and directions.
5. ———: ———: ———. Evidence examined, and *held* (1) to sustain the finding of the jury that the negligence of the defendant in error was not the proximate cause of his injury; (2) not to sustain the finding of the jury that the negligence of the railway company was the proximate cause of the defendant in error's injury.

ERROR from the district court of Deuel county. Tried below before HOLCOMB, J. *Reversed*.

See opinion for references to cases.

J. M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error.

John R. Brotherton and McClanahan & Halligan, contra.

RAGAN, C.

Patrick Doyle brought this suit in the district court of Deuel county against the Union Pacific Railway Com-

pany (hereinafter called the "railway company") for damages which he alleged he had sustained by reason of the negligence of the railway company. Doyle had a verdict and judgment and the railway company brings the same here for review on error.

1. We have carefully examined the complaints made by the railway company as to the action of the district court in permitting certain questions to be propounded to and answered by its witnesses on their cross-examination, and have reached the conclusion that the court did not err in that respect. It would subserve no useful purpose to set out these questions in this opinion.

2. At the time the accident sued for herein occurred, and before that time, Doyle was a section hand in the employ of the railway company. He and a number of other men were employed by one Cochran, who was what is called a section foreman or boss in the employ of the railway company. All these men were hired by Cochran, the section boss, were subject to discharge by him, and were under his direction and control while engaged in working upon their section of the railway. At this time the railway company had a gravel or work train on its road hauling earth and gravel and placing them on the track. Cochran and his gang of men were put at work on this train, and the train crew and some other laborers of the railway company on the train, and Cochran and all his men, while working on the gravel train were under the control, direction, and supervision of a foreman named Forrest, but the latter had no authority to hire Doyle nor to discharge him. The railway company complains because the district court refused to instruct the jury to the effect that the facts above narrated made Forrest and Doyle fellow-servants. Whether one of several employes of the same master is a vice-principal as to his co-employes, or whether all are fellow-servants, is not always a question of law nor always a question of fact. Generally it is a mixed question of law and fact, and, as was said in *Union P. R. Co. v. Erickson*, 41 Neb., 1,

we are not prepared to lay down any set rule as a test for determining when two or more employes are fellow-servants or one of them a vice-principal. The relationship existing between the employes of a common master is to be determined by the particular facts and circumstances in evidence in the case in which it is presented.

In *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb., 254, Lundstrom was a day laborer in the employ of the railroad company and was one of a number of men employed on and about a construction train. This train and its crew were engaged in the business of clearing snow from the railway track. The train crew and all the men, including Lundstrom, engaged in working with the construction train were under the direction and subject to the control and orders of the conductor of that train. Lundstrom was injured by obeying an order of the conductor, the giving of which, he alleged, was negligence, and this court held that the relation existing between Lundstrom and the conductor of the train was not that of fellow-servants of a common master, but that as to Lundstrom the conductor was a vice-principal. The court said that the conductor represented the railway company, with all its authority and power.

In *Burlington & M. R. R. Co. v. Crockett*, 19 Neb., 138, the husband of the administratrix was boss or foreman of a gang of trackmen in the employ of the railroad company, and with his men was put to work on a gravel train hauling gravel and earth for repairing and strengthening the railway track. The gravel train and the section foreman and his men were all under the control and direction of the conductor of the gravel train. Crockett was killed by obeying an order of the conductor, which, it was alleged, was negligently given, and the court held that the conductor of the train and Crockett, the boss of the section gang, were not fellow-servants, but that as to Crockett the conductor of the train was a vice-principal.

In *Sioux City & P. R. Co. v. Smith*, 22 Neb., 775, Smith

was an employe of the railway company and engaged in the business of repairing bridges, water tanks, and telegraph lines. He and a number of other men were under the charge of a foreman named King. King and his men had possession of a hand car, which they used to ride on from their boarding place to the work, and after the day's work to ride back on to their boarding house. One evening after their work was finished King and his men got aboard this hand car for the purpose of going to their boarding house, and by the direction of King the car was pushed up to the rear of the caboose of a freight train and some of the men held to the rear car of the freight train, and thus the hand car was carried forward on the track as rapidly as the freight train proceeded. The freight train ran on a curve and King gave an order to his men to let go the freight train, but Smith did not hear this order and held on to the way car in front. King then applied the brake to the hand car, which caused it to instantaneously stop, and Smith was thrown off the hand car and injured. He sued the railway company for damages, alleging that the act of King in applying the brake to the hand car caused his injury, and that such act was negligence. The railway company insisted that Smith and King were fellow-servants, but the court held that King was a vice-principal.

In *Chicago, B. & Q. R. Co. v. Sullivan*, 27 Neb., 673, a man named McCarty was a car repairer for the railroad company. He gave notice to the company that he intended to quit at a day named in the future, and thereupon the company employed Sullivan to take his place and put Sullivan to work under McCarty's orders and directions, so that he might learn the duties of a car repairer before McCarty's time expired. Sullivan went in between or under some cars standing on a track at Falls City to make some repairs at the direction of McCarty, and while there at work a train backed up against the cars under which Sullivan was at work and injured him. He sued the company for damages, alleging that his in-

jury was the result of obeying a direction of McCarty's, and that such direction was negligently given. This court reversed the judgment because of an instruction given by the trial court, but said that the evidence quoted above constituted McCarty a vice-principal as to Sullivan.

It is to be observed that in each of these cases the employe was held to be a vice-principal because of the fact that he had the control, supervision, and direction of the man injured; and the latter was subject to and bound to obey the orders of the party held to be a vice-principal. These cases control the question under consideration. Doyle was under the control and direction and subject to the orders of Forrest; it was his duty to obey whatever order or direction Forrest might give; Forrest and Doyle were, therefore, not fellow-servants.

Palmer v. Michigan C. R. Co., 53 N. W. Rep. [Mich.], 397, is strikingly like the case at bar. In that case Palmer was a section hand on the Michigan Central railroad; had been employed by one Cavanaugh, who was a section foreman on said road. Cavanaugh and his men, including Palmer, were put to work loading steel rails on a moving train of flat cars owned by the railroad company. This train of cars, its crew, and Cavanaugh and his men, while engaged in loading these rails, were all under the direction of the assistant roadmaster. Palmer was injured, as he alleged, through the negligence of the assistant roadmaster, and the railway company contended that Palmer and the roadmaster were fellow-servants; but the court held that the assistant roadmaster was a vice-principal as to Palmer. The court said: "It is too clear to admit of argument that the assistant roadmaster had the exclusive, unconditional control of all the men engaged upon this work at the time of the accident. He had charge of and directed the method of its performance, and while it does not appear that he personally had anything to do with employing plaintiff in the first instance, yet his authority was so great that at least while engaged in this particular work he even had control

and direction over the section foreman." To the same effect see *Bloyd v. St. Louis & S. F. R. Co.*, 58 Ark., 66.

In *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S., 377, the supreme court of the United States held that a conductor of a railroad train, who has the right to command the movements of the train and to control the persons employed upon it, represents the company while performing those duties and does not bear the relation of fellow-servant to the engineer and other employes of the corporation on the train. The court said: The conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it and control over the persons employed upon it, represents the company, and, therefore, that for injuries resulting from his negligent acts the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner.

It is insisted in argument here that because Forrest was not invested with authority to hire and to discharge Doyle, that, therefore, he cannot be considered a vice-principal as to Doyle. It is to be observed that in none of the cases cited was an employe held a vice-principal as to his co-employes because of the fact that he had authority to hire or discharge such employes. All the cases cited make the employe a vice-principal because of his power of direction and control over his co-employes. If an employe be vested with authority to hire and discharge, that is evidence which tends pretty strongly to show that as to such employe he is a vice-principal, but we do not think it would be conclusive evidence that such relation existed; nor does it follow that one employe is not a vice-principal as to his co-employes because he is not vested with authority to hire and discharge them. The most satisfactory evidence that one is, as to his co-employes, a vice-principal, is that his co-employes are

under his supervision, his control, subject to his orders and direction.

But it is insisted that the supreme court of the United States has overruled *Chicago, M. & St. P. R. Co. v. Ross*, *supra*, and that, therefore, that case should no longer be followed. We have not been able to find any case in which the supreme court of the United States has expressly said that it overruled, or intended to overrule, the Ross case. In *Baltimore & O. R. Co. v. Baugh*, 149 U. S., 368, an engineer and fireman were running on a locomotive not attached to any train and not in charge of any other employe of the road. A rule of the company provided that when an engine was running without a conductor that the engineer should be regarded as conductor and acted accordingly. The fireman was injured through the negligence of the engineer and sued the company for damages; but the court held, distinguishing the Ross case, that the engineer and fireman were fellow-servants; that the engineer was not as to his fireman a vice-principal. It seems to us that the decisions in the Ross case and the Baugh case cannot be reconciled.

In *Northern P. R. Co. v. Peterson*, 51 Fed. Rep., 182, 16 Sup. Ct. Rep., 843, Peterson was a section hand in the employ of the railroad company and was at a station called Old Superior, on the railroad. Work became scarce and he applied to the roadmaster for employment. The latter gave him a pass to a station on the road named Poplar in order that he might go there and obtain work on the road. At that station was a number of men under a foreman named Holverson. These men were called an "extra gang," and their duty was to go over some two or three sections of the road and assist the regular section gang in keeping the track in repair. Holverson employed Peterson in his "extra gang." All the men under Holverson were hired by him, were subject to his orders, and he had authority to discharge them. While Peterson was at work on the track with other section men, all under the control and direction of Holverson,

he was injured, as he alleged, through Holverson's negligence. He sued the railroad company for damages; it defended on the ground that Holverson and Peterson were fellow-servants. But the court of appeals held that Holverson as to Peterson was a vice-principal. The supreme court of the United States reversed this judgment and held that Holverson and Peterson were fellow-servants. Mr. Chief Justice Fuller and Justices Field and Harlan dissented, and it is to be regretted that they did not file dissenting opinions. The court based its decision upon the ground that Holverson was not a "chief" of a separate and distinct department or branch of the business of the railroad company. This decision in effect not only overrules the Ross case but practically destroys the doctrine of vice-principal in railroad cases. The logical effect of this decision is that all section men, track repairers, section bosses, bridge repairers and their bosses, construction trains, work trains, and their conductors and foremen, are fellow-servants; and the roadmaster, and he only, as to them is a vice-principal, because he is the "chief in charge of that branch or department of the railroad company's business," namely, the care and repair of the track. We do not assume to criticise this opinion but we are at liberty to point out the result which must flow from it if it shall stand. The opinion attempts a classification for the operation of a railroad that no general manager would countenance for a moment. The managers of railroad corporations have not made the trackmen and the section men, the foremen of gravel and construction trains and the crews thereof, fellow-servants. They have divided their roads into sections, and on each section they have placed a number of men to repair and care for the track, and over these men they have placed a superintendent, a boss, or foreman, with authority to hire and to discharge these men, with supervision and control over them. This boss is not required to labor and is paid a higher wage than a common laborer; and to the road-

master, and to him alone, is this boss responsible. They have placed upon their roads certain construction and gravel trains. On these trains there is a conductor, an engineer, a fireman, a brakeman, and with these trains go a number of laborers, each gang under immediate charge of one or more bosses, and all these men, including the train crew, the bosses, and the common laborers, are placed in charge of a foreman who superintends, manages, controls, and directs when, how, and where the work shall be done, and this foreman is not made by the rules of the railroad company a fellow-servant with the men under his direction, but he is responsible for his conduct to the roadmaster.

We repeat that we have not examined these opinions of the supreme court of the United States for the purpose of criticism. For our part we are satisfied to follow the Ross case. The decisions of our own court in the 16, 19, 22, and 27 Neb. are all based upon the principles which control the Ross case, and whether it be considered as distinguished or overruled by the tribunal which rendered it, we still think it is law; and we are not prepared to adopt the doctrine that an employe, to become a vice-principal as to his co-employe, must be the "chief of a separate and distinct department or branch of the business of his employer." The court did not err in refusing to instruct the jury that Forrest and Doyle were fellow-servants.

3. Another argument is that the finding of the jury that Doyle's injury was not the result of his own contributory negligence is not sustained by sufficient evidence. The evidence shows that this gravel train consisted of an engine and tender next to which was a tool car. These were equipped with an air brake. Following the tool car were twelve flat cars and an ordinary caboose, connected together by means of links and pins, the space, or slack, between any two cars being about two feet. The train was standing upon the track. Forrest, the foreman in charge, was standing on the ground north of the

train and north of a ditch on the north side of the track. The men had finished shoveling the dirt from the car next to the caboose, to the ground. Forrest then said to Doyle: "Come down and shovel this earth between the rails." Doyle prepared to obey the order by stepping from the flat car to the platform of the caboose; at that moment Doyle heard Forrest call to the engineer to pull up a car length. The bell rung, the whistle sounded, the train moved, Doyle standing on the platform either intending to alight from the car while in motion or to alight after it stopped. The train moved at a rate of speed not to exceed a mile and a half an hour. Without warning to Doyle, Forrest gave a signal to the engineer for an instantaneous stop of the engine. The order was obeyed. The engine stopped instantaneously. The caboose on which Doyle was standing struck against the car in front of it and Doyle was thrown against the brake and injured. The jury, by its verdict, has said that Doyle was not guilty of contributory negligence in standing upon the platform of the caboose as he did while the train was moving, and we think the evidence sustains that finding. It may have been evidence of negligence for Doyle to stand there. When the engine stopped Doyle may have heard the clashing together of the cars in time to have braced himself to prevent a fall. He may have taken such precaution to brace himself as he thought necessary to his protection. Under the circumstances we do not think his not going into the caboose and taking a seat was conclusive evidence of negligence on his part. But whether Doyle's conduct, under the circumstances, was negligence upon his part was for the jury, and we cannot say that they reached a wrong conclusion in finding that he was in the exercise of ordinary care. In *Jeffrey v. Keokuk & D. R. Co.*, 9 N. W. Rep. [Ia.], 884, Jeffrey was employed as a shoveler upon a construction train. This train was equipped very much like the one in the case at bar. It had an engine, a number of flat cars, and a caboose. In the caboose the men

kept their dinner pails and coats. It was the custom of the men, when the work was finished and the train started in to the station, while the train was in motion, to put their tools into a tool box on a car on the train and to get their coats and dinner pails and be ready to leave the train immediately on its reaching the station. The construction train started to the station. The conductor was on the platform of the caboose and Jeffrey on the rear of the flat car in front thereof. As the train neared the station Jeffrey, having deposited his tools in the tool box, started back to the caboose to get his coat, and as he reached the rear end of the car next the caboose, and while standing there, he saw the conductor pull the pin which coupled the caboose to the train and give the engineer a signal. The train started forward with an accelerated speed. Jeffrey was thrown from the end of the car where he was standing, to the track, and run over by the caboose. The jury found that Jeffrey was in the exercise of ordinary care when he was injured and the supreme court of Iowa, reviewing the evidence, held that Jeffrey had the right to assume that the speed of the train would continue the same afterwards as before the caboose was uncoupled, and that he was not bound to suppose because he had seen the signal given to the engineer and seen the caboose uncoupled, that the car on which he was standing would be pulled forward with an "unusual jerk." In that case five seconds only intervened between the time when Jeffrey saw the signal and the occurrence of the jerk which threw him from the car on which he was standing.

4. But is there any evidence here to show that Doyle's injury resulted from the negligence of this railway company, or any one connected with it? Doyle knew that the train was in motion. He knew that it was being moved up about a car's length so that he and others might get off and shovel the earth between the rails, and he was charged with notice that when the car on which he stood had moved up about a car's length that it would

stop. The evidence that Forrest called out to the engineer to pull up a car's length does not justify a conclusion of negligence. The fact that the train moved at a mile and a half an hour does not justify a conclusion of negligence. The fact that the train stopped instantaneously does not justify a conclusion of negligence. Had Doyle and his co-laborers been at work shoveling earth from this train and Forrest had given a signal to start it without any warning thereof that would have been evidence of negligence. Had the train been in motion and these men shoveling the earth from the train and Forrest had given a signal to stop the train without any warning, that would have been evidence of negligence; but these are not the facts in this case. The work had been done. The order had been openly and notoriously given and heard by Doyle for the train to pull up about a car's length. The whistle had been sounded and the bell rung and Doyle knew not only that the train was moving but he knew that it was to move about a car's length, and when it had gone about that distance he knew that it was to stop. The negligence charged to the railway company here is not the starting of this train; not the speed at which it was moving, but its being stopped instantaneously without warning to Doyle. He knew when he first reached the platform of the car, and while he was standing there he knew that the train was being pulled up to a particular place and was likely to stop the moment it reached it. It is not for us to say whether Doyle was guilty of contributory negligence in standing on the platform as he did while the train was in motion. It is not for us to say that he was guilty of negligence in not watching and bracing himself and preparing for the stopping of the train. All that was for the jury and they have said that he was not guilty of contributory negligence under the circumstances, and we have no disposition to interfere with that. But the fact remains that if he was injured such injury was not the result of any negligent act or omission of this railway

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company or any of its servants. Doyle's theory is that the train was moving very rapidly and that it was stopped instantaneously without notice to him, which threw him against the brake and hurt him. With all due respect to the jury, one of two things is not true. Either that train was not moving rapidly or it was not stopped instantaneously. A heavy locomotive engine, if moving rapidly, cannot be stopped instantaneously by an air break or any other appliance known. If it was not stopped instantaneously then there was no violent jamming of the caboose against the car in front of it, and to sanction the verdict of the jury finding both ways on that proposition is to judicially determine that the laws of nature which control the universe have no application in Nebraska. The judgment of the district court is reversed.

REVERSED AND REMANDED.

CHARLES O. LOBECK V. ELBERT T. DUKE.

FILED FEBRUARY 3, 1897. No. 7020.

1. Guaranty: SALE OF STOCK IN CORPORATION: TERMS: CONSTRUCTION.

L. sold stock in a corporation to D., guarantying that it could be sold for \$3,000 within one year, D. agreeing not to sell within a year without L.'s consent for less than \$3,000, and that in case of sale without such consent D. should lose the difference between \$3,000 and the amount of the sale, D. agreeing to use due diligence in procuring a larger price. The stock was not sold within a year and was thereafter sold for much less than \$3,000. *Held*, (1) There having been evidence tending to show exchanges of property for other stock in the same corporation during the year, it was proper to instruct the jury that the agreement contemplated a sale for money, and that D. was not required to make any efforts to exchange it for other property; (2) whether or not D. had been negligent in failing to make a sale within the year was a question of fact, and it was, therefore, not erroneous to refuse to instruct the jury that a failure to make certain specified efforts constituted negligence; (3) that D. was not required by the terms of the contract to submit to L. for acceptance or rejection all offers received by D. during the year.

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2. **Action on Guaranty:** RECOVERY BY PLAINTIFF. Evidence held to sustain the verdict, and instructions not to be conflicting or prejudicial to defendant.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J. *Affirmed.*

James W. Carr, for plaintiff in error.

E. Wakeley and A. C. Wakeley, contra.

IRVINE, C.

On the 5th of May, 1891, Lobeck, in exchange for a stock of hardware, transferred to Duke, as part of the consideration, stock in a corporation known as the Omaha Hardware Company, of the par value of \$5,000. At the same time Lobeck executed to Duke the following instrument:

"For value received, I hereby guarantee that the shares of stock this day assigned to Elbert T. Duke, known and designated as numbers 78, 79, 80, 81, and 82 (ten shares each), inclusive, of the Omaha Hardware Company, can be sold at and for the sum of \$3,000 within one year from the date hereof. The said E. T. Duke binding himself not to sell the same within said year without my consent, in writing, for less than \$3,000, and in the event of such sale without such written consent he shall lose the difference between the amount of such sale and the said \$3,000, and in the event of a failure to sell the same for at least \$3,000 by the end of said year, I hereby agree to make good any difference arising from the sale thereof, the said Duke hereby agreeing to use due diligence in procuring a larger price for the same.

"Omaha, May 5, 1891.

C. O. LOBECK.

"Witness:

"JAS. W. CARR."

Duke not having sold the stock within a year, proceeded, after the expiration of that time, to offer it at public auction, and thereby sold it for \$750. He then

brought this action against Lobeck on the written guaranty for the difference between \$3,000 and the amount realized on the sale of the stock. It is claimed that the sale was not *bona fide*, but under the instruction as to the measure of damages and the finding of the jury this issue becomes immaterial. Duke had judgment and Lobeck prosecutes error.

At the request of the plaintiff the court instructed the jury that "the agreement between the parties had reference to a sale of the stock for money, and Mr. Duke was not required to use due diligence or make any efforts to exchange the stock for property, and he would have no right to make any trade of that character without making some new arrangement with Lobeck." It is claimed that this instruction is erroneous, as conflicting with other instructions given, whereby the case was submitted to the jury on the theory that the plaintiff, in order to recover, was bound to prove that he had used due diligence within the year to effect a sale. For the purpose of ascertaining the value of the stock and the practicability of making a sale during the year, considerable testimony had been introduced as to actual transactions between other parties, and there was evidence tending to show that some stock had been transferred within the year at an agreed valuation sufficient to meet the terms of this guaranty, but that such transactions were in the way of exchanges for real estate and other property, and were not cash sales. It is a well known fact that in exchanging one species of property for another the parties to the exchange are not unlikely to place a valuation upon their respective holdings beyond their cash value, and beyond what the parties themselves consider to be their value. We think, therefore, this instruction, in view of the evidence, was a proper caution to the jury, and in nowise conflicted with the other instructions requiring due diligence to procure an actual sale.

The court also, at plaintiff's request, instructed that "due diligence in trying to dispose of the stock did not

require Duke to make efforts for that purpose beyond such as in the judgment of reasonable men of experience in such matters would have been adopted to that end." It is claimed that this instruction contradicts and renders nugatory an instruction given at the request of the defendant, to the effect that due diligence means that the plaintiff must be active in his endeavors to dispose of the stock, and must use all means at his command and which a reasonably prudent business man would use. We are unable to perceive the conflict. The two instructions together amount to this: that the plaintiff must be active in his endeavors and must use all means which a reasonably prudent business man would use, but is not required to make any effort which would not be made by a reasonable man of experience in such matters. If the court in the instruction complained of had said "reasonably prudent business man," instead of "reasonable man of experience in such matters," the instructions would be alike in their effect, one being positive and the other negative. The only qualification peculiar to the instruction complained of is its requiring such efforts to be made as would be made by a person experienced in such matters. This rather added strictness to the rule laid down, and thereby operated more favorably to the defendant than the instruction requested by him standing alone.

The court refused an instruction requested by the defendant to the effect that if the plaintiff failed to list his stock in the hands of those agencies which made it a business to deal for others in such matters, or to properly advertise the same in the usual mediums therefor, such failure would be negligence on his part. This instruction was properly refused. The court had correctly defined the rule of diligence and what that rule required, and whether or not the plaintiff had satisfied it were questions of fact under the circumstances of this particular case. They were not questions of law. Therefore the court properly refused to enter upon the domain of the jury.

The court also refused to instruct that it was the plaintiff's

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iff's duty to submit any offers he might receive to the defendant for his approval. It is somewhat doubtful whether the evidence would permit a finding that any *bona fide* offer was made to the plaintiff during the year. But, however that may be, we do not think the contract placed any such burden on the plaintiff. It provided that if he sold at less than \$3,000 during the year without defendant's consent he must bear the loss; but it did not require him to make any sale for less, nor did it give to the defendant any option to require any particular sale to be made. The stock was the plaintiff's, for sale according to his own judgment, with the sole restriction that the guaranty could not be enforced in case a sale was made without Lobeck's consent at less than \$3,000 during the year.

Finally, it is claimed that the evidence does not sustain the verdict. It would be useless to review the evidence. We are satisfied that it was sufficient.

AFFIRMED.

JOHN STEEN, APPELLEE, v. THOMAS STRETCH ET AL.,
APPELLANTS.

FILED FEBRUARY 3, 1897. No. 7043.

1. **Usury.** A was indebted to B in a certain sum and to C in a further sum. The contract with C was usurious. A obtained a larger loan from B and from its proceeds discharged both debts. C acted as the agent of B in examining the title and drawing the instruments, and in paying the money; but C's debt was entirely separate from B's, and B was not aware that the additional money borrowed from him was to be used in satisfying C's usurious loan. *Held*, That the last transaction was not tainted by the usury inherent in the debt to C.
2. —: **BANK DISCOUNT.** Under our statute any rate of interest agreed upon not exceeding ten per cent per annum is valid, and interest, if the parties so agree, may be taken yearly or for any shorter period, or in advance. *Held*, That under this statute it is not usurious to compute the interest according to the process known as "bank discount;" that is, to deduct interest at the rate

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of ten per cent, if that rate be agreed upon, calculated on the face of the note or other evidence of indebtedness, and to pay the borrower the difference.

3. **Mortgages: CONSIDERATION.** A mortgage given to secure the guarantor of the mortgagor's note is not void for want of consideration, although given after the debt accrued without new consideration, and given before the surety paid the debt.
4. ———: ———: **CONSTRUCTIVE NOTICE.** A mortgage was executed to A for the purpose of indemnifying him against loss on a note of the mortgagor, the payment of which he had guaranteed. The mortgage on its face was conditioned absolutely to pay the note referred to, and did not disclose the relation of the parties as principal and surety. *Held*, That a subsequent incumbrancer was charged with notice by the record of A's mortgage, and was not entitled to priority because it did not truly state its conditions.

APPEAL from the district court of Saunders county.
Heard below before WHEELER, J. *Reversed in part.*

M. B. Reese, for appellant Sanford.

Simpson & Sornborger, for appellants May and Stretch.

E. F. Gray and *D. B. Carey*, for appellee Steen.

O. C. Tarpenning and *Guttery & Silver*, for other appellees.

IRVINE, C.

Steen instituted this action for the purpose of foreclosing a mortgage executed by Thomas Stretch and wife on land in Saunders county. A number of persons were made defendants and a decree was rendered establishing the several amounts and relative priority of the various liens and awarding foreclosure. There is no controversy as to some of these liens and it is unnecessary, therefore, to state their nature or the facts relating thereto. Of the contested liens priority was awarded that of Whitfield Sanford. He claimed under a mortgage to secure a note of \$3,800 executed by Stretch. Stretch urged in defense that the transaction was usurious. The court so found and awarded Sanford merely the amount by

him advanced, without interest. From this part of the decree Sanford appeals. The next lien was awarded the plaintiff Steen, on the mortgage first referred to. The following was awarded James C. May on a later mortgage. Stretch defended against Steen's mortgage on the ground that it was without consideration. Stretch appeals from that part of the decree awarding Steen a lien. May also appeals from this part of the decree, claiming that the court erred in giving the Steen mortgage priority over his. We shall treat these three appeals in their order.

There is no substantial conflict in the evidence. The facts surrounding the Sanford claim are, in brief, as follows: Sanford held two notes of Stretch, one for \$1,500, the other for \$1,100. Both notes bore interest at the rate of ten per cent per annum. The interest on the \$1,100 note was made payable in advance and was represented by coupons. Stretch was also indebted to C. W. Sanford, the son of Whitfield Sanford, on two notes, one for \$313 the other for \$418. Both of these notes were usurious. C. W. Sanford in many matters acted as agent for Whitfield Sanford, his father, but the evidence is uncontradicted that with regard to Stretch their transactions were entirely separate, although a portion of Stretch's business with Whitfield Sanford was transacted through C. W. Sanford's agency. Stretch applied for a further loan. Whitfield Sanford inspected the property, and finding it in his opinion to afford sufficient security, agreed to make a loan of \$3,800 thereon, the two notes which he already held to be paid from the loan. He directed C. W. Sanford to make the necessary examination and draw the papers. Accordingly the \$3,800 note and mortgage were drawn by C. W. Sanford and executed by Stretch. The note was made for five years, bearing ten per cent interest per annum. One year's interest was deducted at the time of making the note, and four coupon notes were executed payable in one, two, three, and four years respectively, each for \$380, and each providing that

if not paid at maturity it should itself draw interest at ten per cent from maturity. At that time there was due on the two notes already held by Whitfield Sanford, \$2,763.40. C. W. Sanford made a charge against Stretch of \$6 for making and examining an abstract of title and drawing the instruments. He surrendered the two Whitfield Sanford notes which were in his possession for collection and applied the remainder of the \$3,800 by agreement with Stretch upon the notes held by C. W. Sanford. The account was made up as follows:

Due Whitfield Sanford on his two notes.....	\$2,763 40
One year's interest thereon.....	380 00
Paid C. W. Sanford for abstract, etc.....	6 00
Paid C. W. Sanford on \$313.00 note.....	352 80
Paid C. W. Sanford on \$418.00 note.....	297 80
Total	\$3,800 00

There is evidence tending to show that in the computation of the sum due on the \$1,100 note interest was computed on delinquent interest, and, as already stated, the coupons attached to the \$3,800 note on their face provide for the payment of interest after maturity. This transaction Stretch claims, and the district court held, was usurious. It would seem at first that this claim would be best supported by the fact that interest had been reserved on delinquent interest already computed at the highest rate permitted by law. It seems to be the doctrine of this court that interest may not be reserved upon delinquent interest where the amount would thereby be greater than simple interest at the highest legal rate. But while the court will not allow such compounding of interest, it does not render the transaction usurious. (*Hager v. Blake*, 16 Neb., 12; *Mathews v. Toogood*, 23 Neb., 536, 25 Neb., 99; *Richardson v. Campbell*, 27 Neb., 644, 34 Neb., 181; *Rose v. Munford*, 36 Neb., 148.) Indeed, we understand counsel for Stretch to concede this point. They state in their brief that they do not contend, first, that an agreement to take ten per cent annu-

ally in advance is usurious; or, second, an agreement to pay interest on overdue interest; or, third, to pay the lender reasonably for abstracting and drawing papers; or, fourth, an agreement to pay interest on interest after maturity.

The brief abounds in mathematics and subtle reasoning; but we gather that Stretch's contention is twofold: First, that C. W. Sanford being the agent of Whitfield Sanford, the \$3,800 note was in effect a renewal of the two notes of C. W. Sanford, and that these being usurious, the whole transaction was tainted; and, second, that while the statute permits taking interest in advance, such interest must be computed on the amount actually paid over to the borrower and not by making a note which by deducting from its face one year's interest on the face thereof, yields the borrower, presently, the amount desired.

As to the first argument we do not think it is borne out by the record. While C. W. Sanford, in many matters, and to a certain extent in this, acted as the agent of his father, Whitfield Sanford, it still appears, by the undisputed evidence, that the two notes to C. W. Sanford, which are conceded to have been usurious, were his own property. They represented a debt from Stretch to him and not to his father. They were paid and discharged out of the proceeds of the loan, the elder Sanford not even knowing how the surplus after discharging his own notes was used. It is inferable from the testimony that no money was actually paid to Stretch; that C. W. Sanford kept a separate bank account embracing his transactions with his father, and drew checks thereon; that he kept a running account of transactions between his father and himself, and that the payment to him was by way of an exchange of credits on this account. The fact remains, however, that Stretch obtained the benefit of this money; that Whitfield Sanford became in no manner a party to the usurious loans, and that the transaction was not essentially different from what it would

have been had Whitfield Sanford or a stranger lent Stretch money, paying it over to him and taking his note, and Stretch had, with that money, paid outstanding notes usurious in their character. Such a transaction would not taint the new loan with usury.

The second argument resolves itself to this: Where interest is reserved at ten per cent, is it lawful to compute that interest on the amount to be paid at maturity, deduct the interest so computed from that amount, and pay the borrower the difference? In other words, does our statute forbid what is known as "bank discount?" The statute is as follows: "Any rate of interest which may be agreed upon, not exceeding ten dollars per year upon one hundred dollars, shall be valid upon any loan or forbearance of money, goods, or things in action; which rate of interest so agreed upon, may be taken yearly or for any shorter period, or in advance, if so expressly agreed. (Compiled Statutes, ch. 44, sec. 1.) This statute was adopted in 1879. By the established custom of bankers existing when the statute was adopted, and emphatically impressed on the mind of every schoolboy in his arithmetic under the title of "bank discount," a loan of \$100 for one year meant the making of a note payable in one year without interest, the deducting of one year's interest at the rate agreed from \$100, and the payment of the difference to the borrower. The statute was passed undoubtedly with a view to that custom, and we think that the provision permitting the taking of interest in advance had reference thereto. The statute, therefore, did not invalidate such a transaction as we have before us. We can find no evidence, therefore, tending to support the plea of usury in the Sanford mortgage, and the decree must in that respect be reversed.

We next direct our attention to the appeal of Stretch against the decree on behalf of Steen. The pleadings allege, and the evidence shows, that Stretch had executed a note to Steen for \$1,005, due in January, 1889. Soon after the execution of this note Steen sold it to

Lyle & Collins, guarantying payment. It was not paid at maturity, and thereafter Stretch and wife executed a mortgage to Steen to secure the note, on Steen's agreement, as averred in his cross-petition, to forbear proceedings for six months, and, as disclosed by the evidence, to forbear "until next fall." Thereafter judgment was recovered on the note against both Stretch and Steen. Steen paid the judgment and thereafter brought this action. Stretch contends that the mortgage so executed was without consideration, chiefly on the ground that Steen had no power to prevent proceedings against the maker, and that his agreement to extend the time of payment "until fall" was too indefinite for enforcement. We need not inquire very closely into these questions. While Steen was not at the time the mortgage was executed the holder of the note, he was obligated for its payment. As between him and the maker, he occupied the position of a surety. We have never heard that a mortgage executed for the indemnification of a surety was without consideration; nor do we think that a new consideration is necessary to support a conveyance made to secure the payment of an existing debt. Questions may arise, and have arisen, as to the effect of such conveyances, between the grantee and other creditors or holders of intervening equities; but these are questions which do not go to the validity of the transaction as between the parties. Every assignment for the benefit of creditors is a conveyance of this character. A large proportion of the mortgages in fact executed have been executed solely to secure pre-existing debts. We are cited in support of this appeal to the case of *Kansas Mfg. Co. v. Gandy*, 11 Neb., 448. In that case it was held that a mortgage executed by a married woman on her separate estate to secure the pre-existing debt of her husband, was without consideration. While the language of the opinion is somewhat general, it is quite clear that the fact that the mortgage was by a stranger to the debt was the controlling consideration, and this seems to have been the interpretation placed on

the case in *Barnes v. Van Keuren*, 31 Neb., 165. On the other hand, our reports are so full of cases supporting mortgages whose sole purpose was the securing of a pre-existing debt, that it would be tedious and supererogatory to cite them.

The appellant May contends that even if the Steen mortgage be good as between the parties, it should be subordinated to his mortgage, which is later in time. In addition to the arguments against the Steen mortgage advanced by Stretch, May argues that the consideration of this mortgage was not truly expressed, and that for that reason its record did not charge him with notice of its nature. The condition of the Steen mortgage, as expressed, is the payment of the note for \$1,005. The mortgage does not recite that the note had been transferred and that Steen's obligation was then that of a guarantor only. But the distinction is not substantial. The true condition was the indemnification of Steen. The liability could not be greater than that expressed in the mortgage. It turned out to be the same. It might have been less; but this would have operated in May's favor. There was no misrecital in the mortgage which made it appear as a less formidable incumbrance than it really was, and May could not have been misled to his disadvantage. Indeed, he does not claim that he was so misled in fact. No estoppel *in pais* was either pleaded or proved. There was no estoppel by deed in favor of May, and to hold the record of an instrument not in all respect accurately describing the real contract of the parties to be invalid and not to charge subsequent purchasers with notice, would be as disastrous in its consequences as it is unfounded in reason. It would displace all deeds where the exact consideration is not recited. It would displace every absolute deed by way of mortgage.

The decree is reversed as to Sanford and the cause remanded with instructions to take an account of the amount due him on the basis of a legal contract, not al-

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lowing, however, interest on delinquent interest installments. In other respects the decree is affirmed.

JUDGMENT ACCORDINGLY.

OMAHA FIRE INSURANCE COMPANY V. PETER F.
THOMPSON ET AL.

FILED FEBRUARY 3, 1897. No. 8137.

1. **Equity: TRIAL OF ISSUE OF FACT: JURY.** The power of a court of equity to obtain the verdict of a jury on any issue or issues is preserved by the Code, and in actions equitable in their nature the trial court may, in its discretion, impanel a jury and submit to its determination such issues of fact as it deems expedient.
2. ———: ———: **VERDICT: JUDGMENT.** When such a course is taken the verdict is at most a determination of the issues of fact submitted. The judgment need not strictly conform thereto, but the court may, on determining the other issues, enter such judgment as the whole case demands.
3. **Insurance: MECHANIC'S LIEN.** The filing of a claim for a mechanic's lien does not in itself establish such lien, even *prima facie*. It is merely the performance of a condition essential to consummate the lien.
4. ———: ———: **EVIDENCE.** Therefore, in an action on a policy of insurance, one of the defenses being that the insured had permitted the property to become incumbered, contrary to a provision in the policy, it was not error to exclude from evidence the record of a claim for a mechanic's lien, no facts being offered to establish the substantive facts creating such lien.
5. ———: **CHATTEL MORTGAGES.** A policy of insurance contained the following: "It is agreed that if any false statements are made in said application this policy shall be void; * * * or if the property be sold or transferred or incumbered, or upon the commencement of foreclosure proceedings; or in case any change shall take place in the title, possession, or interest of the assured in the above mentioned property; or if the assured shall not be the sole and unconditional owner in fee of said property; * * * then in each and every one of the above cases this policy shall be null and void." It did not appear that any application had been made or required, or that any representations had been made with regard to the title. *Held*, That the existence of a chattel mortgage on a

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part of the property at the time the policy was written did not, under the clause quoted, avoid the policy.

6. **Chattel Mortgages.** A chattel mortgage in this state creates merely a lien, and does not pass title to the mortgagee. *Musser v. King*, 40 Neb., 892, followed.
7. **Insurance: BILL OF SALE: CHANGE OF POSSESSION.** The voluntary execution by the insured of a bill of sale of a portion of the property, without consideration, without delivery to the vendee, without the vendee's knowledge, without any prior contract, and without change in possession, does not create such a change in interest as to avoid the policy.
8. ———: **ACCORD AND SATISFACTION.** To an action on a policy of insurance the defendant pleaded that after the loss it had made a settlement with the insured, whereby it agreed to pay a certain sum in sixty days, and that, relying on such settlement, it had accepted orders of the insured in favor of third persons for a portion of the amount, and had admitted indebtedness in garnishment proceedings which resulted in a judgment against it for another portion, the aggregate amount assumed being less than the amount of the settlement. It was not alleged that these obligations had been paid. *Held*, That this neither operated as an accord and satisfaction, nor did it estop the plaintiff from rescinding the agreement on the ground of fraud.
9. ———: ———: **BURDEN OF PROOF.** To such answer the plaintiff replied denying the settlement pleaded, and then affirmatively alleging that he had agreed to accept the sum of money named on condition that it be paid in four days. *Held*, That under these pleadings the burden was on the defendant to establish the settlement as it alleged it to be.
10. **Damages: PREJUDICE OF JURY.** The mere fact that a verdict for \$2,865.30 was \$105 in excess of the amount recoverable is not sufficient to show that the jury was influenced by passion or prejudice.
11. **Insurance: ATTORNEY'S FEE.** Under Compiled Statutes, chapter 43, section 45, the court may, in an action on a policy covering both real and personal property, allow a reasonable attorney's fee, based on the amount recovered on account of the real property.

ERROR from the district court of Holt county. Tried below before KINKAID, J. *Affirmed*.

W. D. Oldham and J. M. Easterling, for plaintiff in error.

H. E. Murphy, M. F. Harrington, and R. R. Dickson, *contra*.

IRVINE, C.

This action was begun by Thompson against the Omaha Fire Insurance Company to recover on a policy of insurance covering certain buildings and also personal property, it being alleged that all of said property had been totally destroyed by fire. The insurance company answered admitting the issuing of the policy and alleging affirmative matters which may be grouped as stating, or attempting to state, three defenses: First, that, contrary to the provisions of the policy and while it was in force, the plaintiff permitted a mechanic's lien to accrue against the real estate, and that thereafter the plaintiff had executed and delivered to his wife a bill of sale of all the personal property. In short, these are allegations of a transfer and incumbrance of the property while the policy was in force. Second, that prior to the issuance of the policy the plaintiff had executed a chattel mortgage on a portion thereof. Third, that after the fire the loss had been settled and adjusted between the parties for \$1,717, which the defendant agreed to pay within sixty days, and that, relying on such adjustment, the defendant had accepted two orders drawn by the plaintiff against the company for portions of the money, one for \$825, the other for \$292, and that still later, relying on the adjustment, the defendant having been summoned in garnishment, had admitted an indebtedness of \$600 to the plaintiff and was adjudged to pay into court the sum of \$129.80. This defense, if it be one, is, in short, either a plea of an adjustment or a plea of accord and partial satisfaction, by becoming obligated to third persons in reliance on the accord. The reply, after a general denial, and a special denial of the settlement pleaded, proceeded to aver that plaintiff had made an agreement with the defendant to settle the loss for \$1,717, but upon condition that said sum of money should be paid immediately upon the return of the adjuster to Omaha, and within four days from the date of the agreement, and that the defendant

had failed to pay any portion thereof within the time fixed. Further, that plaintiff had been induced to enter into such agreement by certain representations, which were false. E. H. Hubbard intervened, and by way of cross-petition alleged an indebtedness from the plaintiff to himself of \$825, the making of an order by the plaintiff upon the defendant for said sum, and its acceptance by the defendant. He prayed for judgment against the defendant for that sum. O. O. Snyder & Co. also intervened, alleging an indebtedness of \$292 and an order and acceptance similar to that of Hubbard. The Sharpless Company intervened and pleaded a judgment against plaintiff, and a garnishment of the defendant and judgment in the garnishment proceedings for \$129.80. The insurance company then filed an application whereby it asked that, because of the multiplicity of interests in dispute, the cause be determined by the court in the exercise of its equity jurisdiction. Instead, however, of proceeding in accordance with this application, a jury was impaneled and the court submitted to the determination of the jury the issues made between the plaintiff and the insurance company, reserving for its own determination the issues presented by the pleadings of the intervenors. The jury trial resulted in a verdict for the plaintiff for \$2,865.30. The plaintiff remitted \$105 from the verdict. The cause then coming on for hearing upon the untried issues, the court found in favor of the three intervenors, and accordingly entered judgment in favor of Hubbard for \$825, in favor of Snyder & Co. for \$292, in favor of the Sharpless Company for \$129, and in favor of the plaintiff for the remainder of the verdict; after deducting the amount remitted. The insurance company brings the case here by petition in error.

The first question raised relates to the refusal of the court to try the cause without the intervention of a jury. This was not error. Assuming that by the several petitions of intervention, and by the nature of the answer of the insurance company, a case was finally presented

which, under the old procedure, would properly be brought in equity, still the trial of any or all the issues to a jury was a matter within the discretion of the trial court. While it has become elementary, it seems that it is impossible to too often remind the bar that by virtue of the Code the distinctions formerly existing between proceedings at law and in equity have been abolished. The constitutional guaranty of trial by jury (Constitution, art. 1, sec. 6) is that "The right of trial by jury shall remain inviolate." That is, the right was not extended by the constitution; it was merely preserved. On the other hand, it was not curtailed. By section 280 of the Code it is provided that "issues of fact arising in actions for the recovery of money or of specific real or personal property shall be tried by a jury, unless a jury trial is waived or a reference be ordered as hereinafter provided." Section 281 provides: "All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by a jury or referred as provided in this Code." These sections were plainly intended to be preservative of the right of trial by jury as it had formerly existed, and are in effect nothing more than a declaration of the former law as to the mode of trial. Under the old procedure the chancellor might obtain the verdict of a jury by permitting an action at law to be instituted, by a feigned issue, or by directing an issue. (2 Daniell, Chancery Pleading & Practice, 1070 *et seq.*) The verdict so reached was merely for the information of the chancellor. Our Code preserves the same right to obtain verdicts on issues in proceedings equitable in their nature, but under the reformed procedure the method is merely by impaneling a jury in the original action and submitting to its determination the issues desired. In an equity case the court may, but is not bound to, so give a jury trial. (*Roggencamp v. Converse*, 15 Neb., 105.) The course taken in this case was perfectly appropriate. As the case was begun, it was in its nature one in which under the constitution either party had a right to demand

a jury. It was simply a proceeding *ex contractu* to recover money. It became complicated by petitions of intervention by parties claiming assignments or liens upon portions of the fund in dispute. The court very properly preserved the original right to a jury trial by trying the direct issues in that way, and with equal propriety avoided complications by reserving the case, so far as it was in its nature equitable, for determination by the court alone.

Under three assignments of error the insurance company argues questions relating to the defenses based on alleged incumbrances and conveyances of the property. The insurance company offered in evidence a claim or statement for a mechanic's lien recorded in the county clerk's office. On objection by the plaintiff this was excluded. The object was to show that in violation of a provision of the policy the property had been incumbered after the policy was issued. The record offered did not establish such a defense. No offer was made to prove any of the substantive facts which under our law give rise to a mechanic's lien. The claim of lien alone is not evidence of the existence of the lien, even as between the parties thereto. The statement does not establish a lien, but the claimant must, in addition thereto, prove the performance of labor or the furnishing of material for the erection, reparation, or removal of a house or other building, and other facts necessary to constitute a lien. The introduction of the statement in evidence merely proves the performance of a condition essential to consummate the lien. It is an instrument prepared and filed by the claimant, to which the owner is not a party, and by which he is not bound in the absence of the substantive facts creating the lien.

The defendant also offered in evidence a chattel mortgage executed by Thompson on certain live stock covered by the policy. This was excluded. It was executed before the policy was written. It was in force at that time, but we are unable to find any provision of the policy

whereby it was avoided for that reason. Without quoting provisions manifestly inapplicable, we quote the following as being the only portions of the policy upon which the defendant can possibly base its contention: "It is agreed that if any false statements are made in said application, this policy shall be void; * * * or if the property be sold or transferred or incumbered, or upon the commencement of foreclosure proceedings; or in case any change shall take place in the title, possession, or interest of the assured in the above mentioned property; or if the assured shall not be the sole and unconditional owner in fee of said property; * * * then in each and every one of the above cases this policy shall be null and void." It is not averred in the answer that in the application the plaintiff misrepresented or concealed the fact of the incumbrance. Nor is there any proof to that effect. Indeed, it does not appear, except by a recital in the policy, that any formal application was made. None was introduced in evidence. So that the mortgage did not tend to prove any defense under the first clause quoted. The following clause manifestly refers to a future sale, transfer, incumbrance, or change of interest, and not to an incumbrance existing at the time the policy was written. This appears generally by the language and particularly by that clause whereby the commencement of foreclosure proceedings avoids the policy. This clearly indicates that existing incumbrances were within the contemplation of the parties, and that the policy was not to be avoided unless foreclosure proceedings should be begun upon them. Finally, notwithstanding the mortgage, the assured was the sole and unconditional owner in fee of the property, as a chattel mortgage does not pass title. (*Musser v. King*, 40 Neb., 892; *Bedford v. Van Cott*, 42 Neb., 229; *Murray v. Loushman*, 47 Neb., 256; *Randall v. Persons*, 42 Neb., 607; *Sharp v. Johnson*, 44 Neb., 165; *Camp v. Pollock*, 45 Neb., 771; *Strahle v. First Nat. Bank*, 47 Neb., 319.) The proof of the mortgage, therefore, did not tend to establish any defense and was properly excluded.

Complaint is made of the sixth instruction. It is too long for profitable quotation in the opinion. It was, however, to the effect that the burden of proof was on the insurance company to establish its defense relating to the transfer of the personal property by the plaintiff to his wife, and that in order to establish such defense it was essential to prove not only the making of the bill of sale pleaded, but, in addition thereto, its delivery to Mrs. Thompson, or her knowledge of its existence and acquiescence therein. It goes without saying that a transfer of personal property may be proved without a bill of sale, either made or executed. But the defendant, both by its pleadings and proof, relied solely on the bill of sale as establishing the transfer. It was not claimed that there had been any change of possession, actual or constructive. There was evidence tending to prove that Thompson had voluntarily executed a bill of sale to his wife and had caused it to be recorded; but that this was without the knowledge of his wife, that it was not in pursuance of any contract made with her, that it was without consideration, and that she obtained no knowledge thereof until the time of the adjustment, or attempted adjustment, of the loss. Certainly the court construed the law as favorably as possible to the insurance company when it adopted the view that the making and delivery of a bill of sale, or the making of one and Mrs. Thompson's acquiescence therein without delivery, were without other circumstances sufficient to prove a transfer or change of interest. We think the burden was upon the company to establish these facts, if not more. We are aware that the delivery of an instrument for record has sometimes been held a constructive delivery to the vendee; but we know of no provision requiring or authorizing the recording of an absolute and unconditional bill of sale of chattels, and its delivery for record can no more be taken as constituting a delivery to the vendee than its delivery to any third person for the purpose of having a copy made.

An assignment of error upon which considerable stress

is laid in the argument relates to the modification of instruction No. 2 given at the request of the plaintiff. The language complained of does not appear in that instruction, but does appear in instruction No. 3. It does not, however, appear that this language was introduced by way of a modification of the instruction; nor does it appear that any exception was taken either to the instruction or to its modification. The assignment, therefore, cannot be considered.

Complaint is made of the seventh instruction. This instruction is very long and relates to the issues tendered by what we have styled the third defense. Its effect is that the burden of proof was upon the insurance company to establish the settlement pleaded, the inference being that the burden was not upon the plaintiff to establish the condition upon which the settlement was based as pleaded in the reply. Further, the instruction proceeds to charge the jury that if the settlement was made, the plaintiff was not bound provided it was procured by the false representations pleaded in the reply, and because of plaintiff's reliance on such representations. It was admitted that the representations, if made, were false. The insurance company now contends that this instruction is erroneous in the first place for casting the burden upon the defendant to establish the agreement, it being urged that the plaintiff in the reply admits this fact. We do not think so. The defendant pleaded an agreement to settle the loss at \$1,717, to be paid in sixty days. The plaintiff denied this, and pleaded an agreement to settle at \$1,717, on condition that it should be paid immediately upon the adjuster's return to Omaha, and within four days. The reply in this respect is, in substance, similar to the special traverse of the common law. The denial of the contract alleged was in itself sufficient to cast upon the defendant the burden of proving it. The affirmative pleading of a different contract was merely an argumentative denial, the inducement of the special traverse at common law, and not

itself traversable. The case is in this respect similar to *McEroy v. Swayze*, 34 Neb., 315, where under a similar state of the issues it was held that the burden was upon the party claiming under the contract to prove it as he alleged it to be. It is further contended that the instruction under consideration was erroneous because it disregarded facts operating as an estoppel against the plaintiff. On this point the theory of the insurance company is that the insurance company, having accepted the orders in favor of Hubbard and Snyder, and having answered as garnishee in the Sharpless case, admitting an indebtedness to the plaintiff, and all in reliance on the settlement, the plaintiff was thereby estopped to rescind the same. But in these facts we see none of the elements of an estoppel. The so-called settlement, if it were enforceable, would not discharge the insurance company without satisfaction by payment of the sum agreed upon. It would still owe that sum, which was greater than the aggregate of the liabilities charged upon it by the orders and garnishment. Had the jury by its verdict found that the plaintiff was entitled to recover less than this aggregate, then the company might well urge that it had changed its possession to its disadvantage in reliance on the settlement. But an accord without satisfaction is not a defense, and the assumption of obligations to third persons of a portion of the amount agreed upon without the payment of such obligations was not a satisfaction. The company was in nowise prejudiced by assuming the obligations, whether or not the settlement was fairly reached.

It is contended that the verdict was the result of passion and prejudice. In support of this counsel refer simply to the verdict itself. This was for a sum less than the face of the policy, with interest. For some reason, not disclosed on the face of the record, the plaintiff felt bound to remit \$105. It may, therefore, be assumed that the verdict was to that extent excessive, but this is insufficient in itself to disclose passion or prejudice.

It is urged that the court erred in allowing an attor-

ney's fee for \$120. By what is known as the "Valued Policy Law" (Compiled Statutes, ch. 43, sec. 45), it is provided "that the court, upon rendering judgment against an insurance company upon such policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs." In *Hanover Fire Ins. Co. v. Gustin*, 40 Neb., 828, it was held that the term "such policy" in the statute refers to policies written upon real property, which is the subject of the preceding sections, and we think this construction is correct. But we cannot concede the argument of plaintiff in error that where a policy covers both real estate and personal property the section is inapplicable. This was a policy written to insure real property, although it also includes personalty. It is probable that in such a case the court should fix the fee with regard to the loss on the real property alone. But judged by that standard, the allowance was in this case reasonable. The total insurance on the buildings was \$1,310. The loss was total, so that the sum insured fixed the amount of recovery on account of the buildings. We cannot say that there was an abuse of discretion in allowing an attorney's fee of \$120 on a recovery of \$1,310 in a case as sharply contested as this seems to have been.

Finally it is urged that the finding and judgment are conflicting and not in accordance with the verdict. In support of this contention it is argued that the jury by their verdict having found that there had been no valid settlement, the court gave effect to such settlement by awarding judgments in favor of the intervenors and did not enter judgment in conformity with the verdict. In discussing the seventh instruction we indicated our view that there was no essential connection between the so-called settlement and the claims of the intervenors. The validity of the settlement in nowise depended upon the validity of those claims, nor did the validity of the claims depend upon that of the settlement. Therefore, by allowing the claims of the intervenors, the court did not

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disregard the verdict, and, treating the action as one in equity, as the plaintiff in error contends it was, the court was not bound to enter judgment in conformity with the verdict. So treated, the verdict was taken simply to inform the conscience of the court upon the issues submitted to the jury, and operated at most as a determination of those issues. It was not decisive of the general result of the case. Payments were computed and judgment rendered on the basis of the verdict, with entire regard to the facts found by the jury and the damages by it assessed.

AFFIRMED.

SELDEN K. EMERSON V. MICHAEL KILROY.

FILED FEBRUARY 3, 1897. No. 7060.

Review. No question of law is presented in this case. Evidence *held* sufficient to sustain the verdict.

ERROR from the district court of Lancaster county.
Tried below before TIBBETS, J. *Affirmed.*

Clark & Allen, for plaintiff in error.

Thomas Darnall and John S. Kirkpatrick, *contra.*

IRVINE, C.

Kilroy brought this action against Emerson to recover rent for a farm and also to recover for a small quantity of rye sold and delivered. Emerson filed a counter-claim asking damages against Kilroy for failure to perform a covenant to furnish a well on the farm, and also for the breach of an alleged contract to sell and deliver to the defendant 120 acres of corn-stalks. On the undisputed evidence, the plaintiff was entitled to recover on both counts of his petition. The jury allowed the defendant

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damages on the counter-claim relating to the well, but evidently found against the defendant as to the corn-stalks. The only question presented by the briefs is the sufficiency of the evidence to sustain the verdict in this last particular. No question of law is involved, and it would be useless to set out the evidence. We think it is sufficient to sustain the verdict.

AFFIRMED.

FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY V. JOHN WATERS.

FILED FEBRUARY 16, 1897. No. 6999.

1. **Carriers: FREIGHT: CONNECTING LINES.** It is the duty of a railroad company in this state, subject to such reasonable rules as may be adopted in the transaction of its business as a common carrier, to receive and transport goods offered for shipment to the terminus of its line, and in case such goods are consigned to a point beyond its line, to safely deliver them to a connecting carrier.
2. ———: **LIABILITY BEYOND LINE OF CARRIER.** A railroad company receiving for shipment goods consigned to a point on the line of a connecting carrier, under an agreement to transport them to the terminus of its own road, is neither at common law nor by statute of this state answerable therefor after their safe delivery to the connecting line named in the bill of lading or contract of shipment.
3. ———: **BILL OF LADING.** Bill of lading examined, and construed as an agreement for the carriage of goods over the defendant's line of road only.
4. **Instructions.** An instruction unwarranted by the evidence, although an accurate statement of the law, is ground for reversal, provided it has a tendency to mislead the jury.

ERROR from the district court of Seward county. Tried below before WHEELER, J. *Reversed.*

William B. Sterling, B. T. White, and D. C. McKillip, for plaintiff in error:

A common carrier of goods may by special contract confine its liability to its own line, though the goods are

consigned to a place on a connecting line. (*Myrick v. Michigan C. R. Co.*, 107 U. S., 102; *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. [U. S.], 123; *McCarn v. International & G. N. R. Co.*, 19 S. W. Rep. [Tex.], 547; *Wichita V. R. Co. v. Swenson*, 25 S. W. Rep. [Tex.], 47; *Mulligan v. Illinois C. R. Co.*, 36 Ia., 181; *Detroit & M. R. Co. v. Farmers & Millers Bank of Milwaukee*, 20 Wis., 130; *Pendergast v. Adams Express Co.*, 101 Mass., 120; *Berg v. Atchison, T. & S. F. R. Co.*, 30 Kan., 561; *American Express Co. v. Second Nat. Bank of Titusville*, 69 Pa. St., 394; *Taylor, Cleveland & Co. v. Little Rock, M. R. & T. R. Co.*, 32 Ark., 399; *Central R. Co. v. Avant*, 5 S. E. Rep. [Ga.], 78; *Savannah, F. & W. R. Co. v. Harris*, 7 So. Rep. [Fla.], 544; *Goodman v. Oregon R. & N. Co.*, 49 Am. & Eng. R. Cas. [Ore.], 87; *Nines v. St. Louis, I. M. & S. R. Co.*, 18 S. W. Rep. [Mo.], 26.)

Norval Bros. and George W. Lowley, contra:

A carrier must furnish suitable vehicles for transportation, and if it furnishes unfit or unsafe vehicles it is not exempt from responsibility because the shipper knew of the defects. (*Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. [U. S.], 123; *Gulf, C. & S. F. R. Co. v. Trawick*, 15 S. W. Rep. [Tex.], 568; *Hunt v. Nutt*, 27 S. W. Rep. [Tex.], 1031; *Welsh v. Pittsburg, F. W. & C. R. Co.*, 10 O. St., 65; 19 Central Law Journal, 164, 165; 27 Central Law Journal, 80.)

Where the damage to goods was caused by negligence in furnishing an unsuitable car, the fact that damage actually occurred on another line is immaterial. (*Hunt v. Nutt*, 27 S. W. Rep. [Tex.], 1031; *Alabama & V. R. Co. v. Searles*, 16 So. Rep. [Miss.], 255.)

Instructions must be construed together, and if when considered as a whole they properly state the law, it is all that is required. (*Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *Gray v. Farmer*, 19 Neb., 69; *Bartling v. Behrends*, 20 Neb., 211; *City of Lincoln v. Smith*, 28 Neb., 762; *Barton v. McKay*, 36 Neb., 633.)

A station agent of a railroad company can bind it by a verbal contract to furnish cars at a given time for the

shipment of freight, unless the shipper knows that the agent has no such authority. Inability of a carrier to furnish cars contracted for, owing to unusually heavy traffic at the time, is no defense to an action for failure to furnish such cars. (*Gulf, C. & S. F. R. Co. v. Hume*, 27 S. W. Rep. [Tex.], 110; *Gulf, C. & S. F. R. Co. v. Hodge*, 30 S. W. Rep. [Tex.], 829.)

Defendant below is liable in case at bar. (*Union P. R. Co. v. Marston*, 30 Neb., 248; *Missouri P. R. Co. v. Twiss*, 35 Neb., 267.)

Post, C. J.

This was an action below in the district court for Seward county, wherein the defendant in error, John Waters, recovered judgment against the plaintiff in error, the Fremont, Elkhorn & Missouri Valley Railroad Company (hereafter called the "railroad company"), and from which the latter prosecutes proceedings in error to this court.

The cause of action alleged in the petition below is (1) that the defendant company neglected and refused, upon the plaintiff's demand, to furnish him, the said plaintiff, cars for the transportation of corn from Goehner station, in this state, to Chicago, between November 12 and 28, 1891, although notified in advance that he would require twelve cars for the shipment of his grain, amounting to 5,000 bushels and over, then on hand, which was, as the defendant well knew, worth in the Chicago market, if delivered during the month of November, eighty cents per bushel, but which was when subsequently delivered worth forty-five cents, or less, per bushel; (2) that on and after November 28, 1891, plaintiff delivered to the defendant company, in good condition, eight car loads of shelled corn, which the latter undertook to transport from the station above named to Chicago, but that through the negligence of the defendant, sixty bushels of said corn, of the value of eighty cents per bushel, was lost, and 5,014 bushels thereof was, on account of the bad condi-

tion of the cars furnished by the defendant, damaged in transit to the amount of twenty cents per bushel. The answer admits the receipt by the defendant company of eight cars of corn, which it undertook to transport from Goehner station to its terminal point at Missouri Valley, in the state of Iowa, where said corn was, by agreement with the plaintiff, delivered in as good condition as when received, to the Chicago & Northwestern Railroad Company, a connecting carrier, and was by the last named company in like condition delivered to the plaintiff's consignee in the city of Chicago. It is in the answer further alleged that there was during the period mentioned in the petition, an unusual and extraordinary demand for cars to be used in the shipment of corn to the Chicago market, and that the defendant company made a just and equitable distribution of cars among its patrons, including the plaintiff. Accompanying the foregoing statements of the answer is a denial which puts in issue the other allegations of the petition. The reply is a general denial.

The assignment of the petition in error to which especial prominence is given by the argument of counsel for the railroad company relates to the giving of the seventh instruction, as follows: "You are instructed, as a matter of law, that where two or more carriers by agreement unite to complete a line of transportation, the freight to be divided between them in definite proportions, and one of them receives goods for one freight for the whole line, and gives a through bill of lading, then each carrier is the agent of the other, and each is liable for damages done to the goods, or any unreasonable delay in transporting the same, on whatever part of the line the same may occur; and, in this case, you are further instructed that the bills of lading introduced in evidence recite that the cars of corn therein mentioned were received by the defendant corporation at Goehner to be carried to Missouri Valley, and thence to Chicago over the Chicago & Northwestern railway, and, if you believe from the evidence that the defendant corporation, at the time the corn was received,

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had an arrangement or agreement with the Chicago & Northwestern railway, by which they were each to unite and form a complete line of transportation between Goehner and Chicago, and each of the connecting companies to have an agreement or definite part of the freight, as between themselves, then the defendant would be liable for any damage or loss happening to the corn on any part of the entire route." This instruction is, it is contended, erroneous, for the reason that it assumes the existence of facts as to which there is an entire failure of proof; a criticism in our judgment altogether warranted by the record. There is in the bill of exceptions no evidence tending to prove that the defendant undertook to transport the corn beyond the terminus of its own line, or an agreement between the said defendant and the Chicago & Northwestern Company with respect to through traffic over their respective lines, while by the contract of shipment, as evidenced by the several bills of lading, it was expressly stipulated that the liability of the defendant company should cease upon the delivery at its depot at Missouri Valley of the property which is the subject of this controversy, in as good condition as when received, to the Chicago & Northwestern Company as a connecting carrier. We insert here so much of the contract mentioned as relates to the subject under discussion:

"READ THIS CONTRACT.

"Receipt for Freight Received at Goehner, Neb., Dec. 5, 1891.

"Received from John Waters in apparent good order by the Fremont, Elkhorn & Missouri Valley Railroad Co., the following described packages marked and numbered as per margin, subject to the conditions and regulations of the published tariff of said company, to be transported over the line of this railway to Mo. Valley, Ia., and delivered, after payment of freight, in like good order to C. & N. W. Ry., a connecting or carrier (if the same are to be forwarded beyond the lines of the company's road) to

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be carried to the place of destination, it being expressly agreed that the responsibility of this company shall cease at this company's depot, at which the same are to be delivered by such carrier, but this company guarantees that the rate of freight for the transportation of said packages from the place of shipment to Chicago shall not exceed tariff per cwt. and charges advanced by this company subject to the following conditions:

* * * * *	
"Marks and Consignee.	Description of Articles.
"Order of H. T. Jones.	Bulk Corn, 40,000 lb.
"Notify Bartlett, Frazier & Co., Ch'go.	
"Car initial, F., E. & M. V.	
"Car No. 3026.	

"J. M. McFADDEN,
"Agent."

McFadden, the defendant's station agent at Goehner, testifies on his cross-examination as follows:

Q. Is that (the C. & N. W. Company) a part of the Elkhorn?

A. It is under a different management.

Q. It is the same system?

A. I guess it is.

There was also introduced in evidence by the plaintiff below a map, upon the upper margin of which appears in bold type the words: "Chicago & North-Western System. The Elkhorn Valley Line. Fremont, Elkhorn & Mo. Valley R. R., and Connections," and in another place, in smaller type, the following: "The North-Western Line, F., E. & M. V., and S. C. & P. R. R." There appears also upon said map, in different colors, the lines of the Chicago & Northwestern, the Fremont, Elkhorn & Missouri Valley, the Sioux City & Pacific, and the Chicago, St. Paul, Minneapolis & Omaha Railroad Companies. This evidence was, it may be assumed, admissible as tending to prove the relationship to each other, in some manner or for some purpose, of the several railroad companies above

named. But the character of such relation, whether that of a common management, a common ownership, or the not unusual agreement for the interchange of business, is not indicated by the words "system" as there employed, and such evidence, with the inferences deducible therefrom, is certainly insufficient to overcome the positive agreement contained in the bills of lading.

As to the common-law liability of the initial carrier upon a through bill of lading on account of loss or damage to goods by a connecting line to which they have been delivered for transportation, the authorities are not harmonious. The question of the carrier's liability in such case has, in this state, been made the subject of both constitutional and statutory regulation. Section 4, article 11, constitution of 1875, provides: "The liability of railroad corporations as common carriers shall never be limited." Section 111, chapter 16, Compiled Statutes, entitled "Railroads," declares that "any railroad company receiving freight for transportation shall be entitled to the same rights and be subject to the same liabilities as common carriers;" and by section 5 of article 1, chapter 72, Compiled Statutes, entitled "Railroads," it is provided that "No notice, either express or implied, shall be held to limit the liabilities of any railroad company as common carriers, unless it shall make it appear that such limitation was actually brought to the knowledge of the opposite party and assented to by him or them, in express terms before such limitation shall take effect." These restrictions were examined in *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb., 463, and held applicable to contracts made in this state for the transportation of goods beyond the carrier's own line. IRVINE, C., in the case cited, after a review of the earlier decisions of this court, says: "The contract of the shipper was with the carrier first receiving the goods, and if such carrier undertook to deliver the goods at their destination, even though it contemplated doing so through intermediate carriers, it assumed a liability of such character for every part

of the route." But the rule thus stated can have no application to the facts of the case at bar, since the limitation here involved relates to the obligation of the defendant company to accept the corn in question for transportation beyond the terminus of its own road, and not to its liability as a carrier under the contract as actually made. It was the duty of the defendant company, subject to such reasonable rules as may have been adopted in the transaction of its business as a common carrier, to receive the plaintiff's corn and transport the same from the point of shipment to the terminus of its line at Missouri Valley, and there safely deliver it to a connecting carrier. But upon the delivery of goods in such case to the connecting carrier designated in the bill of lading, or contract of shipment, the common-law liability of the initial carrier ceases, and any duty on its part respecting the transportation of such goods over connecting lines results from contract obligations. It was accordingly competent for the defendant company to contract for the transportation of plaintiff's corn from Goehner station to Missouri Valley, and to stipulate that its responsibility therefor should cease upon the delivery of said corn to the Chicago & Northwestern Company. It is possible that the contract of shipment might, notwithstanding the language of the bills of lading, have been shown by extrinsic evidence to contemplate the through carriage of the corn. That question is, however, not presented by the record or the arguments of counsel and will not be further noticed in this connection. It is sufficient that the contract, unexplained, is for the transportation of the corn to Missouri Valley only; that said contract is in no proper sense a limitation of the liability of the defendant company as a common carrier, and that there is no competent evidence of an agreement between the defendant and the Northwestern Company for the issuing of through bills of lading or for the "division in definite proportions," or otherwise, of freight charges for grain forwarded by the former. The instruction above set out being unwar-

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ranted by the evidence, is, as has often been held, erroneous. (*Newton Wagon Co. v. Diers*, 10 Neb., 284; *Esterly v. Van Slyke*, 21 Neb., 611; *Esterly Harvesting Machine Co. v. Frolkey*, 34 Neb., 110.)

It is, however, contended that the transaction between the plaintiff and McFadden, the station agent, at the time the cars in question were "ordered," amounted to a contract by the latter in behalf of the defendant company which could, under the statute quoted, be modified only upon proof of actual notice to the plaintiff and his assent in express terms thereto. It is not doubted that a railroad company is *prima facie* liable for the failure to furnish cars in accordance with the verbal agreement of a station agent acting within the scope of his authority. (*Gulf, C. & S. F. R. Co. v. Hume*, 87 Tex., 211; *Gulf, C. & S. F. R. Co. v. Hodge*, 30 S. W. Rep. [Tex.], 829.) And the same principle was recognized by the court in *Union P. R. Co. v. Marston*, 30 Neb., 241. But the claim with respect to a verbal contract for the transportation of the corn is unsupported by the record. The plaintiff, according to his own testimony on November 12 and 16, notified McFadden that he would require cars for the shipment of his corn to Chicago, whereupon the latter promised to provide cars but without naming a definite number or time for their delivery at Goehner. There was, so far as the evidence discloses, nothing said respecting the defendant's undertaking, whether for the transportation to Chicago or to the terminus of its own line, nor are there any facts from which we can infer an agreement on that occasion for a through shipment of the plaintiff's grain. The transaction in question certainly lacks the element of certainty which is essential to all valid contracts.

There are other propositions discussed by counsel, but which are mainly incidental to the question here decided, and will not be noticed in this opinion.

For reasons above stated the judgment is reversed and the cause remanded.

REVERSED.

NIELS SEIEROE, APPELLEE, v. WILLIAM R. HOMAN, IM-
PLEADED WITH CENTRAL LOAN & TRUST COMPANY
ET AL., APPELLANTS.

FILED FEBRUARY 16, 1897. No. 7014.

1. **Subrogation: PAYMENT OF SUPERIOR MORTGAGE: MISTAKE.** The right of subrogation exists in favor of a creditor who has paid the amount of a mortgage or other incumbrance in order to protect his own subordinate lien, or when as the holder of such subordinate lien he has, through mistake or inadvertence, satisfied a prior lien upon the property covered thereby.
2. ———: **EXISTENCE OF RIGHT.** The right of subrogation must in every case rest upon some recognized principle of equity jurisprudence, such as a mistake of fact, an agreement or understanding that the money advanced was for the express purpose designated, or the like. (*Bohn Sash & Door Co. v. Case*, 42 Neb., 281.)
3. ———: ———. Evidence examined, and held to sustain the findings of the referee and the decree based thereon.

APPEAL from the district court of Douglas county.
Heard below before FERGUSON, J. *Affirmed.*

The opinion contains a statement of the case.

Wharton & Baird, for appellants:

The court erred in applying to the case at bar the doctrine announced in *Bohn Mfg. Co. v. Kountz*, 30 Neb., 719. (*Henry & Coatsworth Co. v. Fisher*, 37 Neb., 207; *Holmes v. Hutchins*, 38 Neb., 601; *Pickens v. Plattsmouth Investment Co.*, 37 Neb., 272; *Hoagland v. Lowe*, 39 Neb., 397.)

References as to right of subrogation: *Johnson v. Barrett*, 117 Ind., 551; *Gilbert v. Gilbert*, 39 Ia., 657; *Fears v. Albee*, 69 Tex., 437; *Walker v. King*, 44 Vt., 601; *Wheeler v. Willard*, 44 Vt., 640; *Robinson v. Erquhart*, 12 N. J. Eq., 524; *Tradesmen's Building, etc., Ass'n v. Thompson*, 32 N. J. Eq., 133; *Guthrie v. Ray*, 36 Neb., 612; *Blodgett v. Hitt*, 29 Wis., 169; *Vall's Heirs v. Fleming's Heirs*, 29 Mo., 152; *Lery v. Martin*, 48 Wis., 198; *Wilton v. Mayberry*, 75 Wis., 191; *Payne v. Hathaway*, 3 Vt., 212; *Bruse v. Nelson*, 35 Ia., 157.

B. G. Burbank, V. O. Strickler, W. H. De France, Kennedy & Learned, J. W. West, B. N. Robertson, E. W. Simeral, Lysle I. Abbott, Montgomery, Charlton & Hall, Elmer E. Thomas, Parke Godwin, Tiffany & Vinsonhaler, and B. F. Thomas, contra.

Post, C. J.

Suit was commenced in the district court for Douglas county by Niels Seieroe against William R. Homan for the foreclosure of a mechanic's lien upon lot 1, in block 362, in the city of Omaha, the facts alleged as the plaintiff's cause of action being substantially as follows: On the 1st day of April, 1890, the plaintiff entered into a contract with Homan, as owner of the premises above described, whereby he agreed to furnish certain material and perform certain labor in the erection of six three-story brick and frame apartment houses upon said premises for the sum of \$10,221, payable upon estimates of the architect. It was further provided in said contract that for all extra brickwork plaintiff should receive \$9.50 per thousand, wall measure, for extra work in excavating 20 cents per cubic yard, and for extra concrete work \$5 per cubic yard; that plaintiff, prior to March 30, 1891, furnished all of the material and performed all of the labor provided for in said contract, and in accordance with the terms and conditions thereof, and that he furnished extra material and performed extra labor under said contract, upon the demand of the owner and the architect, amounting to \$1,672.50, making a total charge of \$11,893.50, which is reduced by payments credited \$9,602.50, leaving a balance of \$2,291, for which decree was sought. It was further alleged that the plaintiff, on the 28th day of July, 1891, and within four months after the furnishing of such material and labor, made an account in writing of the items of the labor and material so furnished under said contract, and, after making oath thereto as required by law, filed the same in the office of

the register of deeds for Douglas county, claiming a lien upon the property above described. To said petition Clarence A. Starr, the Central Loan & Trust Company, the Home Investment Company, the Insurance Company of North America, William D. Windsor, James D. Windsor, James Morton & Son, John J. Hannighen, John A. Lindquist, Charles Hill, W. H. Bell, John Upton, Edward Ericksen, J. A. Fuller & Co., and Milton Rodgers & Sons were also made defendants.

The pleadings subsequently to the petition are exceedingly voluminous, covering more than one hundred and thirty printed pages, hence a statement of their contents must be confined to a bare outline of the issues presented. Homan, the owner, answered admitting the plaintiff's claim in part, but alleging defective workmanship and a failure to complete the buildings within the specified time, and praying judgment in the sum of \$2,400, but since he has failed to appeal from the decree in plaintiff's favor, it is unnecessary to notice the issues tendered by him. The Central Loan & Trust Company, which will hereafter be referred to as the "trust company," filed answer, in which, after a denial of the essential allegations of the petition, it alleges that Homan and wife, on the 1st day of April, 1890, executed in its favor two mortgages upon the property in controversy, to-wit, one for \$30,000, to secure the bond of the said William R. Homan, payable June 1, 1897, with interest from date at the rate of six per cent, and one for \$2,100, to secure the note of the said William R. Homan, payable in fourteen semi-annual installments of \$150 each, without interest, and which said mortgages were filed for record April 21, 1890; that on the 11th day of June, 1890, the plaintiff executed the following waiver:

"We, the undersigned, taking full notice of the fact that the Central Loan & Trust Company, of Des Moines, Iowa, are making a loan of \$32,100 to Wm. R. Homan, secured by mortgage on the following described property, to-wit, lot 1, block 362, city of Omaha, and a strip

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twenty feet wide adjoining on east, do hereby consent and agree that any right we now have, or which may accrue up to 6 o'clock P. M. of November 1, 1890, to file a mechanic's lien against said property shall be, and the same is hereby, junior and subject to the lien of the mortgages to said Central Loan & Trust Company. Expecting to receive a part of the proceeds of said loan, we make the above agreement in order to enable said Wm. R. Homan to proceed with the negotiations with said company. It being understood and agreed that this agreement in no manner divests us of our rights to file mechanic's liens against said property, except as above stated.

"Dated at Omaha, Neb., this 11th day of June, 1890.

"N. SEIEROE,

"Brick Contractor."

It is further alleged by the said trust company that on December 1, 1890, it loaned to Homan the further sum of \$3,000, and canceled and acknowledged satisfaction of the two mortgages above described, taking in lieu thereof three first mortgages upon several equal portions of the premises in controversy for \$10,000, \$11,000, and \$12,000, respectively, also second mortgages upon said several tracts for \$700, \$770, and \$840, respectively, and which mortgages were all filed for record December 9, 1890, that the release of the mortgages first above described was an act of inadvertence on the part of the said trust company, and that plaintiff and all persons furnishing labor and material for the erection of said buildings had notice that the mortgage debts were not in fact paid. Accompanying said answer is a prayer for an accounting and decree of foreclosure in favor of the said trust company as trustee for its co-defendant, the Insurance Company of North America, of the \$10,000 mortgage above described, an accounting and decree of foreclosure in its favor, as trustee for defendant James D. Windsor, of the \$11,000 mortgage above described, and an accounting and decree of foreclosure in its favor, as trustee for de-

fendant William D. Windsor, of the aforesaid \$12,000 mortgage; also for an accounting and decree of foreclosure in its own right of the three second or commission mortgages above described, and for the additional sum of \$247.27, being taxes paid by it upon the mortgaged property. There is also a further prayer for a decree adjudging the \$30,000 mortgage above described to be a valid first lien in favor of said trust company as trustee of the Insurance Company of North America, James D. Windsor, and William D. Windsor, and that the aforesaid \$2,100 mortgage be declared to be a valid second lien in its favor in its own right.

To this answer and cross-bill the plaintiff replied admitting the execution of the two mortgages by Homan and wife for \$30,000 and \$2,100, respectively, and alleging that said mortgages were paid in full on or prior to January 17, 1891, on which day they were by the trust company canceled and satisfied of record; that the plaintiff's signature to the written waiver above set out was procured by means of false representations of the said trust company to the effect that it, the said company, was about to advance to Homan the sum of \$30,000 to be used in the construction of the buildings herein described, and that plaintiff would be paid therefrom the full amount due by virtue of said contract, including extras, whereas the sum of \$10,000 and more of said amount was by said company and Homan diverted from said use and expended for purposes entirely foreign to the improvements contemplated in said waiver; that on the date of the execution of said waiver, to-wit, June 11, 1890, there was due plaintiff, under his contract with Homan, the sum of \$7,250, and that if the full sum of \$30,000 had been expended in the construction of said buildings it would have satisfied the lawful claims of contractors and laborers, including the plaintiff. It is also, in effect, alleged that the waiver in question applied to mortgage liens, aggregating \$32,100, upon the lot as an entirety, and that the plaintiff has never been willing that his claim

should be subordinated to mortgage liens aggregating \$35,350 upon fractional parts thereof.

The Windsors and the Insurance Company of North America filed answers, each alleging the purchase of one of the three notes executed by Homan to the trust company, December 1, 1890; that by agreement with the said company the latter was, in its capacity as trustee, authorized in their behalf to prosecute any action or actions for the foreclosure of the mortgages given to secure said notes. They also allege that the prior mortgages were canceled and discharged of record through inadvertence of the trust company, and ask that the said mortgages may be foreclosed in accordance with the prayer of the said trustee. The other defendants, with the exception of Starr, to whom reference will hereafter be made, answered alleging liens superior to the several mortgages herein described, but as the vital question of the controversy appears from the issues made by the plaintiff and the defendants claiming under the mortgages, it will not be necessary to prolong this statement by further reference to the pleadings.

Upon the completion of the issues, the cause was, by agreement, submitted to Hon. D. D. Gregory, upon whose report and finding a decree was entered for the plaintiff, and also for defendants Lindquist, Ericksen, Fuller & Co., Morton & Son, and Hannighen, who were adjudged entitled to first liens and to prorate with each other, and from which the said trust company, in its own right and as trustee for the Windsors and the insurance company, have prosecuted an appeal to this court.

The referee's report, so far as it is material to the questions discussed on this appeal, is here set out:

"Your referee finds in regard to the issues raised upon the cross-petition of the Central Loan & Trust Company praying the foreclosure of its several mortgages, that the testimony establishes the following facts:

"First—That at the instance of the defendant Homan, the Central Loan & Trust Company loaned the sum of

\$30,000 and took a mortgage bond and mortgage upon said premises to secure said amount of the date of April 1, 1890, and additional mortgage to secure the sum of \$2,100 which was designated as for commissions due the Central Loan & Trust Company in the negotiation of said loan and represented the difference between six and seven per cent interest for the life of the first mortgage, seven per cent per annum being the amount for which the original loan was contracted. That these two mortgages were duly recorded in the recorder's office of Douglas county, Nebraska, on April 21, 1890.

"Second—That upon the 11th day of June, 1890, Seieroe, the plaintiff, waived his right of priority to any mechanic's lien which might accrue prior to November 1, 1890, in favor of the Central Loan & Trust Company for \$32,000. The consideration expressed for the waiver was the expecting to receive a portion of the proceeds of said loan.

"Third—In like manner, upon the 28th day of August, 1890, J. J. Hannighen made waiver of the priority of lien to said Central Loan & Trust Company under the same terms and conditions.

"Fourth—The testimony further shows that the defendant Homan desiring additional money, and the Central Loan & Trust Company preferring that the mortgage of \$30,000 be divided into separate mortgages of smaller sums, did, at the date of December 1, 1890, obtain three additional mortgages from said Homan to secure the three several amounts, one for \$12,000, one for \$10,000, and one for \$11,000. The said several mortgages were given upon three several sections of forty-four (44) feet front each of the premises in controversy, and at the time there was also made three commission mortgages, one for \$840, one of \$700, and one of \$770, which mortgages were severally given to secure the sums named for the difference between six and seven per cent, the original loan being made at seven per cent per annum, and the three several mortgages were severally placed upon the

divisions named, and that all of said mortgages were duly recorded upon the 9th day of December, 1891, and that in consideration of the execution and delivery of these mortgages the Central Loan & Trust Company duly canceled of record the \$30,000 mortgage and the \$2,100 mortgage, and treated the loan of \$30,000 and the commission mortgage pertaining to it, as paid and discharged.

"Fifth—It is further shown from the evidence that at the time of the execution of the first mortgage of \$32,100 there was a prior mortgage upon said premises amounting to \$10,181, held and controlled by Bates, Smith & Co., and that the first moneys out of the said loan of \$30,000 was taken and used in the discharge of such mortgage as a prior incumbrance. It further appears in evidence that the Central Loan & Trust Company paid over the money directly to Homan without assuming any direction as to its application or use, or possessing any accurate knowledge as to the state of the account between Homan and his contractors, basing their priority of lien upon the waiver of the principal contractors engaged in the erection of said buildings, and that the three mortgages were taken in place of and represented the money of the first mortgage of \$30,000, save and except as to the \$3,000 additional advances.

"The Central Loan & Trust Company, for itself and in behalf of the assignees of said mortgages, William D. Windsor, the Insurance Company of North America, and James D. Windsor, ask that their interest be subrogated to that of the first mortgage of \$30,000.

"First—Your referee finds as a matter of law that subrogation will be allowed to a creditor when he has paid off a prior lien to protect an existing junior lien, or when as a creditor he has discharged a lien through inadvertence or mistake, in that a court of equity could say in conscience and good morals that he should be subrogated to the right of the holder of such prior lien. But subrogation is not allowed to volunteers nor to strangers, and

never to intermeddlers; nor is it the province of a court of equity to relieve parties from their mistake of judgment, carelessness, or mistake of law in entering into a contract.

"Second—The Central Loan & Trust Company is charged in law with the full knowledge of every fact that existed at the time of this exchange of mortgages, and for the purpose of its own accommodation voluntarily entered into a new contract with the defendant Homan, and in consideration of the additional loan of \$3,000 Homan was induced to make six several mortgages, as before stated, upon the cancellation of the two mortgages that had been executed prior thereto. No inadvertence or mistake of fact is shown by which the Central Loan & Trust Company was misled or deceived as to any existing fact. Consulting its own convenience and deeming it to its own advantage to hold six several mortgages instead of two, it accepted the same as executed by Homan for and in discharge of the pre-existing mortgages. Your referee therefore finds no equities in favor of the Central Loan & Trust Company upon which this claim for subrogation in law can rest, and recommends that the prayer of the Central Loan & Trust Company, in so far as it asks to be subrogated to the right of mortgagee the first named, be denied.

* * * * *

"Your referee further finds that the Central Loan & Trust Company has paid taxes upon the property in question from time to time, amounting in all, principal and interest, up to the first day of this term of court, to the sum of \$631. But your referee further finds that Clarence A. Starr, acting as trustee of the said property and in interest of the Central Loan & Trust Company, received the sum of \$5,000 as rentals therefrom, and in good conscience the duty rested upon said trustee to have first paid the said taxes out of said rentals, and that the lien for taxes should be subordinate of claims of all other lien-holders, but that the course of conduct having been

acquiesced in by William R. Homan, the Central Loan & Trust Company as to him would be entitled to a lien upon said premises for the amount and foreclosure therefor, and as well as to the respective sums in the six mortgages hereinbefore set forth."

We will first notice the argument of appellants which is directed to the alleged waiver by the plaintiff. Several propositions are discussed in this connection, all of which depend upon the effect to be given the release by the trust company of the prior mortgages. Appellants, in their discussion of the question above indicated, invoke with seeming confidence the doctrine of subrogation, and insist upon priority over the liens for labor and material, on the ground that the proceeds of the prior mortgages were, with the knowledge of appellees, expended in the construction of the building mentioned, thus by the amount thereof increasing the security of the latter; but to that proposition we are unable to give our assent. On the contrary, it is clear from the findings above quoted that there are in this case no facts upon which to base the right of subrogation. There must, as was held in the recent case of *Bohn Sash & Door Co. v. Case*, 42 Neb., 281, as a condition to the right of subrogation, in addition to the inherent justice of the case, concur therewith some established principle of equity jurisprudence as recognized and enforced by courts of chancery. Indeed, the conclusion of the learned referee in passing upon that question is a treatise of itself, and has abundant support in the decisions of other courts. (*Shinn v. Budd*, 14 N. J. Eq., 234; *Receivers of New Jersey M. R. Co. v. Wortendyke*, 27 N. J. Eq., 660; *Unger v. Leiter*, 32 O. St., 210; *Banta v. Garmo*, 1 Sandf. Ch. [N. Y.], 383; *Sandford v. McLean*, 3 Paige [N. Y.], 122; *Marvin v. Vedder*, 5 Cow. [N. Y.], 671.) To review at length in this connection the cases cited by appellants would prove a profitless task. It is sufficient that they in nowise conflict with the conclusion of the referee or the views expressed by us in *Bohn Sash & Door Co. v. Case*, *supra*. The record, so far as it sheds any light

upon the execution of the six mortgages bearing date of December 1, 1890, and the satisfaction of the two prior mortgages, lends no support to the contention of appellants. There is not alone a failure of proof to sustain the allegations that the prior mortgages were discharged through inadvertence or mistake, but the irresistible inference from the evidence is that the arrangement in question was deliberately made by the trust company as mortgagee, and for its own accommodation, and to enforce the canceled mortgages at this time for its protection would be to violate the plainest principles of equity.

There is a further contention to the effect that plaintiff's lien was not filed within the statutory period after the furnishing of the material and labor which is the basis of this claim. The referee has found specifically that the lien was filed within four months from and after the completion of the contract, and an examination of the record has satisfied us that that finding is in accord with the decided weight of the evidence. The lien, as we have shown, was filed July 28, 1891, and the last work, being the construction of certain brick piers and area walls called for by the plans and specifications, was completed April 7 of the same year.

What is said above applies with equal force to the claims of other defendants whose liens were by the decree given priority over the mortgages of appellants. No sufficient reason has been suggested for interference with the decree of the district court, which is accordingly

AFFIRMED.

NIELS SEIEROE ET AL. V. FIRST NATIONAL BANK OF
KEARNEY.

FILED FEBRUARY 16, 1897. NO. 7085.

1. **Negotiable Instruments: CONTEMPORANEOUS CONTRACTS: EVIDENCE.**

In an action on a promissory note, or other written agreement, a contemporaneous contract in writing, connected therewith by direct reference or by necessary implication, is admissible as part of the transactions involved.

2. ———: ———: **MORTGAGES.** In a promissory note otherwise in the usual form it was recited that "this note is secured by a real estate mortgage of date herewith and governed by the conditions thereof." The mortgage referred to, after authorizing foreclosure in case of non-payment of interest or taxes, contained the following clause: "But no general execution shall issue herein against the maker or indorser of said note, but the mortgagee, or his assigns, shall be entitled to immediate possession of the premises, and shall take the same in full satisfaction of his debt." *Held*, To exempt the makers and indorsers of the note from personal liability thereon, and to restrict the remedy of the holder of the mortgage security.

ERROR from the district court of Buffalo county. Tried below before BATES, J. *Reversed.*

H. C. Burnett, V. O. Strickler, and R. A. Moore, for plaintiffs in error.

E. C. Calkins and Warren Pratt, contra.

POST, C. J.

This cause originated before a justice of the peace for Buffalo county, from whence it was taken by appeal to the district court for said county, where a trial was had, resulting in a verdict for the plaintiff therein under the direction of the court, upon which judgment was subsequently entered and from which the defendants Moore and Seieroe prosecute error to this court. The cause of action alleged is the following promissory note of Moore and Shipman:

Seieroe v. First Nat. Bank of Kearney.

KEARNEY, NEB., March 10, 1891.

"Twelve months after date we promise to pay Niels Seieroe, or order, (\$150) one hundred and fifty dollars, with ten per cent interest from date, interest payable semi-annually. And it is further agreed that this note is secured by a real estate mortgage of even date herewith and governed by the conditions thereof; and in case an action is commenced to foreclose said mortgage, a reasonable sum shall be allowed as attorney's fees and made a part of the judgment hereon.

R. A. MOORE.

"J. E. SHIPMAN."

The mortgage to which reference is made in the note was executed by Shipman and wife and contains the following, among other provisions: "It is distinctly understood that the legal holder or holders hereof may immediately cause this mortgage to be foreclosed; but no general execution shall issue herein against the maker or indorser of said note, but the mortgagee, or his assigns, shall be entitled to immediate possession of the premises and the rents, issues, and profits thereof, and shall take the same in full satisfaction of said debt." The makers of the note and Seieroe, the payee, whom it is sought to charge as an indorser, answered separately, each alleging as a defense the condition of the note and mortgage above set out which, as they claim, exempts them from personal liability and restricts the remedy of the payee and his assigns to the mortgage security.

The first contention of plaintiff in error is that the two instruments are, for the purpose of determining the question of their liability in this action, to be construed as a single contract. That proposition is obviously sound and rests upon a principle distinctly recognized by this court in *Polo Mfg. Co. v. Parr*, 8 Neb., 379, and *Grimison v. Russell*, 14 Neb., 521. See, also, 1 Randolph, Commercial Paper, sec. 198, and cases cited.

The next and only remaining question is that of the construction of the note and mortgage when read together. *Kennion v. Kelscy*, 10 Ia., 443, was an action on

Seieroe v. First Nat. Bank of Kearney.

a promissory note, to which the defendants answered setting out a mortgage executed by them contemporaneously with the note sued on, as a part of the same contract and containing the following recital: "But it is agreed general execution shall not issue herein." In reviewing an order sustaining a demurrer to the answer on the ground that it failed to state a defense, the court, by Lowe, C. J., say: "This covenant was incorporated in the mortgage for some purpose. What was that purpose? It seems to us that there can be but one answer given to that question. It is that the mortgagee should look to the land mortgaged alone for the satisfaction of his debt in case he resorted to any remedial process to enforce his claim. Under this contract he can never have a general execution and, therefore, as a matter of legal propriety, he is not entitled to a general judgment, but is limited in his remedy to a special proceeding against the mortgaged premises." The reasoning there employed appears to be unanswerable and applies with even greater force to the case at bar, since it is here expressly stipulated that no general execution shall issue against the makers or indorsers of the note, but that "the mortgagee, or his assigns, * * * shall take the same [the mortgaged premises] in full satisfaction of said debt."

Counsel for defendant in error argue that the construction contended for would nullify the promise to pay, which is the principal incident of the note, an interpretation, it is claimed, alike destructive of the contract and opening the doors to fraud and deceit. But to that argument we answer that an agreement such as is here involved is simply an acknowledgment by the mortgagee or pledgee that he relies upon the security exacted and not upon the personal credit of the promisor. Again, counsel overlook the fact that the note is but a part of the contract, and that the true character of the transaction is to be ascertained from the terms of each instrument as modified or limited by the conditions contained in the other. The agreement in this case, when thus

viewed, is susceptible of but one construction, viz., a pledge of the property described in the mortgage as security for the debt, limited by an undertaking on the part of the mortgagee to look to the property pledged for the satisfaction of his debt and exempting the makers and indorsers of the note from personal liability thereon.

JUDGMENT REVERSED.

**MERCHANTS SAVINGS BANK OF PROVIDENCE, APPELLEE,
V. HATTIE A. NOLL ET AL., IMPLEADED WITH W. F.
THOMAS, ASSIGNEE, APPELLANT.**

FILED FEBRUARY 16, 1897. No. 7023.

1. **Appearance: WAIVER OF NOTICE.** A defendant by a general appearance in an action thereby waives the issuance and service of summons therein.
2. **Review: HARMLESS ERROR.** A decree will not be reversed by this court on account of error unless prejudicial to the complaining party.
3. **Transcript for Review.** The record of the trial court, for the purpose of an appellate proceeding, when certified as required by law, imports absolute verity. (*Worley v. Shong*, 35 Neb., 311.)
4. ———: **CORRECTIONS.** In such case, if the record is incorrect or incomplete, the remedy is by appropriate proceeding to secure a correction thereof in the lower court. (*Omaha Loan & Trust Co. v. Hogeboom*, 47 Neb., 9.)

APPEAL from the district court of Dawes county.
Heard below before BARTOW, J. *Affirmed.*

Allen G. Fisher, for appellant.

Albert W. Crites, contra.

POST, C. J.

This was a proceeding by the appellee, the Merchants Savings Bank of Providence, Rhode Island, in the district

court for Dawes county to foreclose a certain mortgage executed by defendants Hattie A. Noll and John Noll to the Western Farm Mortgage Company. The appellant, Thomas, as assignee of the Sioux City Dry Goods Company, was made a party defendant and answered setting up a judgment against one O'Connor, to whom the mortgaged premises had been conveyed by the Nolls. There was a decree adjudging the plaintiff's mortgage to be a first lien upon the premises therein described, and awarding to the appellant a third lien thereon. Subsequently, and after the decree had been entered at large upon the record of the court, the appellant moved to strike from the records the last clause in the recorded decree, for the reasons: (1.) There is not of record, nor was there ever made by the court, any order for a decree of foreclosure. (2.) There is no warrant of law, nor any statute giving any authority, for the court to enter the order giving the plaintiff possession of the premises in controversy. (3.) There has not been filed in this case any evidence upon which the decree could be founded. (4.) Plaintiff has not filed any note or mortgage as required by statute for the foundation of the decree." From an order overruling said motion, as well as from the original decree, an appeal is prosecuted to this court.

The first proposition stated in the brief of appellant is that the decree is erroneous, for the reason that there was no service upon defendant Hattie A. Noll. It is a sufficient answer to that contention that the defendant named entered her voluntary appearance, thereby waiving the issuing and service of summons.

It is next argued that the district court erred in awarding to the plaintiff possession of the premises in controversy pending the sale thereof under the decree, or until payment of the amount adjudged due upon the mortgage. But appellant is not shown to be entitled to the possession of the mortgaged property, nor does he, so far as we can discover, claim any interest in the rents thereof. The decree is, therefore, at most as to him error without prejudice.

It is contended that the decree is not supported by sufficient proof, the notes and mortgage described in the petition not having been produced or filed with the clerk. But in the absence of a bill of exceptions containing the evidence before the district court, this assignment may be dismissed without further notice.

It is further contended that the decree has, without leave of the district court, been materially altered since its entry of record. Upon a suggestion by counsel for appellant assailing the transcript as filed herein, an order was made requiring the clerk of the district court to send up a true and certified copy of the decree appealed from, and which sustains the claim of the appellee in every particular. The record of the trial court, for the purpose of proceedings by petition in error or appeal, when properly certified, imports absolute verity. (*Worley v. Shong*, 35 Neb., 311; *Sullivan v. Benedict*, 36 Neb., 409.) If such record is incomplete or incorrect, the remedy is by appropriate proceeding to secure a correction thereof in the lower court. (*Omaha Loan & Trust Co. v. Hogeboom*, 47 Neb., 9.)

DECREE AFFIRMED.

HOWARD WHITNEY, SHERIFF, v. CYRUS K. SPEARMAN.

FILED FEBRUARY 16, 1897. No. 7040.

1. **Parol Evidence: COMMERCIAL PAPER: INDORSEMENTS.** A general indorsement of commercial paper may, except as against a *bona fide* holder, be explained and the precise terms of the agreement shown by parol evidence. (*Corbet v. Fetzer*, 47 Neb., 269.)
2. **Final Order: INTERVENTION.** An order striking a petition of intervention on the ground that it was not filed within the time allowed therefor is not such a final order as will be reviewed upon petition in error to this court.

ERROR from the district court of Sarpy county. Tried below before BLAIR, J. *Affirmed.*

Rich, O'Neill & Sears, for plaintiff in error.

H. C. Lefler, Kennedy, Gilbert & Anderson, and *W. W. Morsman*, *contra*.

POST, C. J.

On the 7th day of July, 1893, Hamilton M. Hinkle and Ethan H. Hinkle, doing business in Sarpy county in the firm name of Hinkle & Son, conveyed to the defendant, Cyrus K. Spearman, by chattel mortgage a stock of merchandise to secure the sum of \$3,870, evidenced by three promissory notes of the mortgagors, to-wit, one for \$1,200, maturing June 19, 1893, one for \$1,200, maturing June 19, 1894, and one for \$1,487, maturing August 18, 1894. On the 20th day of July plaintiff in error, Whitney, as sheriff of Sarpy county, seized the property aforesaid in the possession of the mortgagee named to satisfy four certain orders of attachment issued in as many separate actions in the district court for said county, by Kirkendall, Jones & Co., McCord, Brady & Co., Gilmore & Rhul, and the Gate City Hat Company, as plaintiffs, against the said Hinkle & Son. Afterward this action of replevin was brought by the defendant in error against the sheriff and prosecuted to judgment in favor of the former, and from which the latter prosecutes error to this court.

The Sarpy County Bank and the Kilpatrick-Koch Dry Goods Company, hereafter called the "dry goods company," claiming to be interested in the property in controversy by virtue of mortgages from Hinkle & Son under date of July 17 and 18, respectively, sought to intervene in the replevin suit in order to assert their rights in that action to the property in controversy, but the petition of the former was stricken from the files on the motion of the court, and the cause proceeded to judgment in favor of the dry goods company against the plaintiff in the sum of \$1,559.11, and from which the bank prosecutes error, assigning as ground for the reversal of the judg-

ment the order of the district court striking its petition of intervention.

Practically the only contention by plaintiff in error Whitney at this time is that the district court erred in permitting Spearman, the plaintiff below, to prove that he was the owner of the \$1,487 note above described, then held by J. D. Spearman & Co., bankers, under an unrestricted indorsement. Said note was at the date of the mortgage, as shown by the testimony of both Spearman, the payee, and the cashier, held by the bank above named as collateral security for advancements to said Spearman appearing upon the books of the bank as an overdraft. The district court found as a matter of fact that said note "was so held as collateral security for an indebtedness of said Cyrus K. Spearman to said bank; that said bank never looked to said Hinkle & Son for any of the interest on said note, nor for the principal thereof, but always looked to Cyrus K. Spearman to make good to it the sum received by said Cyrus K. Spearman at the time of transferring of said note to the bank." This finding is unquestionably supported by the evidence, and is, we think, material to the issues actually tried. The testimony was not, it should be remembered, received for the purpose of verifying the terms of the unrestricted indorsement as against one claiming to be a *bona fide* holder of the note. Between the parties to such an indorsement the precise terms of the contract is always a subject of inquiry and may be shown by parol evidence. (*Cortelyou v. Hiatt*, 36 Neb., 584; *Holmes v. First Nat. Bank of Lincoln*, 38 Neb., 326; *True v. Bullard*, 45 Neb., 409; *Corbet v. Fetzer*, 47 Neb., 269.) And the rule thus recognized applies with equal force to a case like that before us, where the objection is interposed by one who is an entire stranger to the transaction. It is probable, although the question is not presented for decision, that the security mentioned will in equity inure to the benefit of the legal holder of the paper. There is, however, in such a transaction no inherent vice, nor is there in the evidence adduced the

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slightest ground for imputing to the contracting parties, or either of them, a purpose to defraud the creditors of the mortgagors. There is no error in the record so far as it relates to the principal controversy, and the judgment in favor of defendant in error Spearman is accordingly affirmed.

Turning to the petition in error of the Sarpy County Bank, we observe, first, that no exception was taken to the order striking the petition of intervention; second, there was interposed by said bank no motion for a new trial; third, there is no final judgment to which said bank is a party. Upon this record comment is unnecessary. It follows that the petition in error must be dismissed.

Petition in error of Sarpy County Bank dismissed.
Judgment in favor of defendant in error Spearman

AFFIRMED.

WILLIAM J. BRYAN ET AL., APPELLEES, V. CITY OF LINCOLN ET AL., IMPEADED WITH ELMER B. STEPHENSON, APPELLANT.

FILED FEBRUARY 16, 1897. No. 8671.

1. **Municipal Bonds: VOTE OF PEOPLE.** The clause, "When the same shall have been authorized by a vote of the people," contained in section 67, subdivision 21, article 1, chapter 13a, Compiled Statutes, under heading "Cities of the First Class," means authorized by a majority of the voters of the city.
2. ———: ———. A proposition to authorize the issuance of funding bonds was submitted to the electors of a city, pursuant to the provisions of such section of the statutes, at the same time and place as the general city election. *Held*, Under the facts shown, to be but one election; that the presumption is that all the electors voted at such election, and the proposition, to work its adoption, must have received a majority of all the votes cast at such election.

APPEAL from the district court of Lancaster county.
Heard below before HOLMES, J. *Affirmed*.

Lambertson & Hall, for appellant.

Boehmer & Rummons, contra:

A proposition submitted to the voters of a municipality at a general election must receive a majority of the votes cast at such election in its favor, in order to be carried. As the bond proposition failed to receive a majority of the votes cast at the election, it did not carry and hence all subsequent acts of the council relative thereto are void. (*State v. Anderson*, 26 Neb., 517; *State v. Bechel*, 22 Neb., 158; *State v. Benton*, 29 Neb., 469; *Douglas County v. Keller*, 43 Neb., 644.)

A. S. Tibbets, also for appellees.

HARRISON, J.

The appellees herein, in their character as residents and taxpayers of the city of Lincoln, instituted this action in the district court of Lancaster county to restrain or enjoin the execution and delivery by the city, the mayor and city council thereof, of certain funding bonds in the aggregate sum of \$534,500 to Elmer B. Stephenson, the alleged purchaser of such bonds. Pleadings were filed and issues joined of which there was a trial, which resulted in a judgment by which the execution and delivery of the bonds were perpetually enjoined. Elmer B. Stephenson of defendants in the trial court has appealed to this court.

The proposition of the issuance of the bonds was submitted to a vote of the people, and of the questions at issue in the district court was the one, Did the bond proposition receive the requisite number of votes to effect its adoption? That it did not was asserted by appellees and is urged in the briefs filed in this court; and on oral argument counsel for appellees especially directed attention to this branch of the case. The proposition of the issuance was, pursuant to the provisions of

the law, submitted to a vote of the electors of the city. Section 67, subdivision 21, chapter 13a, article 1 of the Compiled Statutes, 1895, page 208, in which is embodied the grant of power to the officers of a municipality of the class to which the city of Lincoln belonged to issue funding bonds, reads as follows: "To provide for issuing bonds for the purpose of funding any and all indebtedness now existing or hereafter created of the city, now due or to become due, when the same shall have been authorized by a vote of the people; *Provided*, That the mayor and council shall not fund any bonded debt at a higher rate. Such bonds shall be redeemable after ten years, at the option of the city." The phrase "when the same shall have been authorized by a vote of the people" is the portion of the section with which we have here more particularly to deal. Authorized by the vote, in this connection, can but mean by a majority, as there are but two answers to be made to the question submitted, an affirmative and a negative; and to be authorized, the matter of the proposition must receive the greater number or majority of the votes. It could not be a plurality, as might be when there are more than two candidates for office, and the one receiving the highest number of votes is elected, but may not have received a majority of the votes. The word "people," as used here, must mean electors or voters. It can have no other signification, and the section in which it occurs have intelligible, reasonable, and sensible force. It was stated in an act that towns and cities might submit a proposition to the vote of the "inhabitants." The word "inhabitants" was held to mean voters. (6 Am. & Eng. Ency. of Law. p. 445; *Walnut v. Wade*, 103 U. S., 683.) The phrase under consideration in the case at bar must necessarily be held, from the act and connection in which it appears, to refer to the vote of the people of the city of the class to which the act is applicable. A fair reading, then, of the phrase would be "authorized by a majority of the vote of the electors or voters of the city." It appears that an ordinance was

passed by the city council in which provision was made for the submission of the proposition of the issuance of the funding bonds to a vote of the electors of the city,—and we will here digress to say that the council probably indicated its construction of the law with reference to the vote necessary to carry the subject of the submission in the ordinance, as did also the mayor in the notice or proclamation published of the election, for it was stated in each that if the majority of the votes cast at the election were favorable to the proposition, the mayor and council should have power to issue the bonds. But returning again to the question proper, it appears that though in some portions of the ordinance the election therein provided was denominated a “special election,” it was fixed to be held on Tuesday, the 3d day of April, 1894, which was the day of the general election for city officers, and the vote on the bond proposition was to be presided over by the same judges and clerks of election as the vote on officers at the general city election. The vote was taken at the same polling places in the city, the same registration lists were used, the same voting booths. Indeed, no measures were used which would mark the vote on the bond proposition as a separate election, except separate ballot boxes were used and probably separate poll lists. This last does not very clearly appear from an inspection of the evidence. This constituted but the one election when considered for the purpose of determining how many persons presented themselves and participated as voters in an election at that time and place. (*State v. Bechel*, 22 Neb., 158.)

The next question which presents itself for consideration and adjudication is whether, under the provision we have quoted in regard to an election on the proposition to issue funding bonds held at the same time and place as the general election of the officers of the city, and practically as a part of that election, to affirmatively indorse the proposition, it required but a majority of the votes cast for or against it, or did it require a majority of the votes

cast at the election? No inherent right or power existed in the city to issue these or any other bonds. To exist it must be conferred by statute. (*State v. Babcock*, 21 Neb., 187.) If issued, they created a debt which is in effect a lien upon the taxable property of the citizens of the municipality. (*Fullerton v. School District*, 41 Neb., 601.) It is but right and just that the provisions of the law regulating the procedure in the preliminaries or precedent conditions to be fulfilled in the authorization of their issuance, should be the subjects of fairly strict construction, and if a doubt arises or is entertained in any particular it should be resolved in the interest of regularity and fullness of compliance with such requirements. An application of this rule in the present instance leads us to the conclusion that to work the adoption of the proposition submitted it was necessary that a majority of all the votes cast at the election be favorable to it, and not only a majority of the ballots cast for or against the proposition. It required, as we have seen by giving to the portion of the section of the statute in reference to the vote its evident, ordinary, and plain import, a majority of the votes of the electors of the city to authorize the proper officers to issue bonds, and it is but fair and reasonable to take the highest number of voters voting at the election on the selection of a person to fill any office for the filling of which the election was being held or for or against any proposition regularly submitted and voted upon, as constituting the body of the electors of the city. The registration lists would not furnish a perfect total of the number, as the body of the voters necessarily changes with the passing of the days, some who have registered probably moving away from the city and new ones coming in who are unregistered, and there would also be many others who do not register, and probably as fair a test of the number of the electors of the city for the purpose for which it is desired in the determination of the question now under consideration is to fix it at the highest number who voted on the selection of any one

office or matter on which an expression of the voters was taken at the then election. It must be presumed that the framers of the section of the statute, by virtue of which this matter of the bond issue was submitted, had it in contemplation that all the electors would vote (as indeed, if possible, they all should), and that a majority of those voting should settle the question. (*Slingerland v. Norton*, 61 N. W. Rep. [Minn.], 322.) To adopt any other construction would cast it within the realm of doubt and uncertainty and involve inquiries whether there were electors who for any reason had not appeared at the polls and voted, would in fact lead to divers, many, and endless questions, invite contests in elections, and, in fact, would seriously cripple or impede, if not entirely destroy, any intended operation of the law. (*People v. Warfield*, 20 Ill., 160.)

In the case of *People v. Wiant*, 48 Ill., 263, the question to be decided was whether a vote taken on the proposition had authorized a removal of the county seat from one town to another. In the law under the provisions of which the submission was made it was stated that if it should appear from a canvass of the votes that a majority of the legal voters of the county had voted for the removal to Wheaton, then that place should be the county seat of the county. The election was held at the same time as the election for circuit judge. A majority of the votes cast on the question of the removal of the county seat was favorable thereto, but not a majority of the whole number cast at the election, as appeared from the poll on the election of the circuit judge. It was held: "Where an election on the question of the removal of a county seat happens to be held at the same time there is another election as for a circuit judge, the vote cast on the single question of removal will not alone govern as to whether a majority of all the legal votes of the county were given in favor of removal, but it must appear that a majority of all the votes cast at that election were so given." And it was further said in the body of the opin-

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ion: "In this case it appears that the majority of the votes cast at the election on the question were for removal, but the clerk's certificate does not show that those voting in its favor are a majority of the votes cast at that election.

* * * In this case, however, there was, at the same time, an election held for circuit judge, which was a regular election. We therefore have, in this case, additional means of ascertaining the whole number of voters of the county. If the return of the various poll books of the county showed a larger number of votes cast for circuit judge, or other officer, than were cast for and against removal of the county seat, then that should be taken as the number of voters of the county; and it should appear that a majority of the voters at that election had cast their votes in favor of removal before the county seat could be changed. It is not the vote cast upon that single question that is to govern where it occurs at any other election held at the same time, but it must appear that a majority of all the votes cast at that election are in favor of removal." (*State v. Winkelmeier*, 35 Mo., 103; *State v. Benton*, 29 Neb., 460; *Stebbins v. Judge of Superior Court of Grand Rapids*, 66 N. W. Rep. [Mich.], 594.)

In the decision in the case of *People v. Brown*, 11 Ill., 478, in considering a section of the constitution of the state of Illinois wherein it was stated: "The general assembly shall provide by a general law for a township organization, under which any county may organize whenever the majority of the voters of such county, at any general election, shall so determine," it was observed: "At the ensuing general election in the county of Woodford one hundred and fifty-three votes were given for and one hundred and seven votes against township organization, while more than six hundred votes were cast in the county. The question arises on this state of case whether the township organization was legally adopted by the people of that county. The section of the constitution before recited is free from all doubt or uncertainty. The language is clear and explicit, and ad-

mits of but one meaning. It does not mean a majority of those voting on the question to be submitted, but a majority of all the legal voters of the county. The right of a county to organize under a law to be passed in pursuance of this provision of the constitution is made expressly to depend upon an affirmative vote of a majority of all the citizens of the county entitled to vote on the question."

We are fully aware that there is a line of decisions which announce a doctrine differing radically from the general rule which we follow in the present case, but some of such decisions have been considered by this court and the doctrine disapproved and a refusal to follow it expressed (*State v. Commissioners of Lancaster County*, 6 Neb., 474; *State v. Babcock*, 17 Neb., 188), and we now indorse what was then stated in this regard.

In our own state, in the case of *State v. Commissioners of Lancaster County*, *supra*, it appeared that the proposition of township organization had been submitted to the voters of Lancaster county at a general election, and that a majority of the votes cast on the proposition were favorable thereto, but not a majority of all the votes cast at the election. The decision involved a construction of section 5, article 10, of the constitution, under which the proposition was submitted, which read as follows: "The legislature shall provide by general law for township organization, under which any county may organize whenever a majority of the legal voters of such county, voting at any general election, shall so determine;" and it was then said by GANTT, J., who wrote the opinion: "I think that section 5, article 10, of the constitution must be construed according to the plain meaning of the words used, and that the language employed therein is mandatory; and therefore, as the affirmative vote on the question submitted was less than a majority of all the legal voters voting at the general election, the proposition to adopt township organization was defeated."

In the case of *State v. Babcock*, *supra*, there was under

consideration section 1 of article 15 of the constitution, which provides for the submission of amendments to the constitution proposed by the legislature to a vote of the electors of the state, and for publication of the proposed amendments for a prescribed time "immediately preceding the next election of senators and representatives, at which election the same shall be submitted to the electors for approval or rejection, and if a majority of the electors voting at such election adopt such amendments, the same shall become part of this constitution." In the opinion written by MAXWELL, J., appears the following statement in regard to the facts: "It is agreed by the parties that the whole number of votes cast at the election in November, 1884, was 134,000 for governor and other state officers, and 132,000 for senators and representatives; and in favor of the proposed amendment 51,959, and 17,766 against the same." It was held that the proposed amendment, to be adopted, must have received a majority of the whole number of votes cast at the election, and as it had not, it was not adopted. For a decision in regard to a similar provision of the constitution of the state of Ohio, on the same subject, see *State v. Foraker*, 23 N. E. Rep., 491.

In the case of *State v. Bechel*, *supra*, the question was of the vote necessary to give consent to a street railway company to construct and maintain a street railway on the streets of Omaha. The proposition was submitted and voted upon at the same time and place as the general city election. The proposition received a majority of the votes cast on that particular question, but not a majority of the largest number of votes cast at the election on any one office or matter submitted, and hence it was held by the court not carried. The submission was made under the following provisions: Section 2 of the article of the constitution entitled "Miscellaneous Corporations," in which it was stated that the legislature should pass no general law "granting the right to construct and operate a street railroad within any city * * * without first

requiring the consent of a majority of the electors thereof," and section 5 of article 8 (now 7), chapter 72, Compiled Statutes, in which the requirement in regard to the vote necessary to carry the question was: "And if a majority of the votes cast at such election shall be in favor of," etc.

In the case of *State v. Anderson*, 26 Neb., 517, the language of section 30, part 1, chapter 18, Compiled Statutes, wherein it states, "If it appears that two-thirds of the votes cast are in favor of the proposition," was held to require for the adoption of a proposition to which the section had reference a number of votes equal to two-thirds of the votes cast upon any one question, or for all the candidates for any one office, at the election at which the proposition was submitted. (See, for approval of general principle, *Douglas County v. Keller*, 43 Neb., 635; and for approval of the doctrine of *State v. Anderson*, *supra*, in regard to the section of the statute therein considered, see *Stenberg v. State*, 50 Neb., 127.)

In the case of *State v. Benton*, 29 Neb., 460, in which the facts in respect to the submission of the question of the issuance of bonds by the school district of the city of Omaha, a metropolitan city constituting one school district, and the manner of conducting the election, etc., were very similar to the circumstances, in the like connection, of the case at bar, there were two provisions of the law applicable to and governing the vote necessary to be cast to carry the proposition under consideration, worded as follows: "A majority of the ballots polled at such an election shall be for issuing bonds," and "The electors shall sanction the issuing of said bonds in the manner aforesaid." The submission was at the same time and place as a regular city election, and the question received a majority of the votes cast as to it, but failed to receive a majority of all the votes polled for some of the offices to be filled at the regular city election, and it was held "not sanctioned by the vote given."

The case of *State v. Roper*, 47 Neb., 417, involved the

consideration of a special election on the proposition of removal of a county seat. It was an election held specially for the purpose of determining the one question, and there was no voting for any person or anything more than the proposition of removal. The decision of this court finally hinged on the determination of the point of whether certain ballots should be counted as votes cast or not. The opinion in the Roper case has no bearing on the question now under consideration, except to the extent that it approves the general rule that when a proposition of the nature of the one out of the vote upon which the controversy in the case arose is submitted at a general election, the highest number of votes cast on any proposition or for any candidate is assumed to be the total number, of which the requisite majority must be obtained.

We have thus referred to the foregoing decisions of this court for the purpose of calling attention to the fact that through and in each and every one of them there is the element or principle that if a proposition is submitted at a general state or municipal election, under a law which requires for the adoption of the proposition a majority of all the votes cast, it must receive more than one-half of the total number of votes polled at such election on any matter or the filling of any office on which a vote is taken. The proposition to issue the bonds is shown to have received a majority of the votes cast for and against it, but not a majority of the votes cast at the election at which it was submitted, hence was not adopted. The power of the officers of the city to issue the bonds depended on the authorization of such action by "the vote of the people," and not on any declaration of the result of the election by the officers, or any of them, or any other person or persons; and the authority not having been granted by the vote taken, they could not issue them. (*Douglas County v. Keller*, 43 Neb., 635; *Stenberg v. State*, 50 Neb., 127.)

It appears that the bonds had been prepared and con-

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tained a clause that they should be "payable in United States gold coin, government standard of present weight and fineness, or its equivalent," or were, as prepared, what are commonly known as "gold bonds," and the question is presented here whether under a general authorization for the issuance of the bonds, if conferred, would the bonds as prepared be valid? Since the decision of the question we have heretofore discussed disposes of the case, and a determination of this one would not change the result, we deem it unnecessary at this time to consider and decide the further query. It follows that the judgment of the district court is

AFFIRMED.

SIDNEY S. STEWART V. HENRY C. SMITH.

FILED FEBRUARY 16, 1897. No. 7117.

1. **Review: SUFFICIENCY OF EVIDENCE.** A case will not be reversed on the ground of the insufficiency of the evidence to sustain the verdict where there is not such a lack of evidence in its support as to lead to the conclusion that it is manifestly wrong.
2. **Action for Commission on Sale of Land: VERDICT FOR DEFENDANT.** Evidence in this case *held* sufficient to sustain the verdict rendered.
3. **Real Estate Agents: COMMISSION.** A real estate broker who is employed to sell or dispose of property has no claim for a commission until he has furnished a purchaser for the property, willing and able to buy it upon such terms and at the price prescribed by the vendor.
4. **Instructions: REQUEST.** If further and more specific instructions are desired on a point covered by the charge given, they must be prepared and presented on behalf of the party in whose interest it is contended they were necessary.
5. ———: **REVIEW.** Certain instructions attacked as erroneous *held* applicable to the evidence, and, when read and construed in connection with other branches of the charge, not to be erroneous or prejudicial to the rights of the complaining party.

ERROR from the district court of Johnson county.
Tried below before BUSH, J. *Affirmed.*

L. C. Chapman and W. E. Stewart, for plaintiff in error.

E. W. Thomas and J. Hall Hitchcock, *contra*.

HARRISON, J.

In this action the plaintiff sought to recover a sum alleged to be his due from defendant as commission on sale of real estate alleged to have been effected by him for defendant. The material portions of the petition filed, after allegations of defendant's ownership of the real estate, were as follows:

"That this plaintiff and defendant, on or about the 3d day of September, 1892, entered into an agreement in which it was stipulated that this plaintiff was to find for and furnish to this defendant a purchaser for the real property aforesaid.

"3. That the terms named in the said agreement on which this plaintiff was to furnish to this defendant a purchaser was as follows: \$4,500, \$2,500 in cash, purchaser to assume a mortgage then on the land of \$2,000, as a part of the purchase price to be paid.

"4. That in accordance with the agreement aforesaid this plaintiff did, on or about the 6th day of October, 1892, furnish to this defendant a purchaser for the said real property aforesaid; that the said purchaser agreed to and with this defendant to purchase the said land upon the terms aforesaid; that at the time of the said agreement between this defendant and the purchaser of the said land the said purchaser was in a financial way able to comply with his part of the contract; that the said purchaser was a *bona fide* purchaser.

"5. That the said service rendered by this plaintiff to this defendant is reasonably worth the sum of \$137.50."

The answer contained an admission of the ownership of the property described in the petition and a general denial of each and every other allegation of the petition. A trial of the issues in the district court of Johnson county, where the suit was instituted, resulted in a ver-

dict and judgment favorable to defendant, from which this error proceeding on behalf of plaintiff has been prosecuted to this court.

One assignment of error presents the question of the sufficiency of the evidence to support the verdict rendered. The sale of the land, on the negotiation of which this action is predicated, was never completed by any payment of the purchase price or any portion thereof, or by any transfer or agreement therefor. Indeed the evidence, although conflicting, warranted a finding that no definite or settled arrangement had been reached as to the terms of a contemplated sale. Of the conflicting evidence there was also sufficient to sustain a finding that plaintiff had never been employed by defendant to sell the land, and possibly that the relation of principal and agent in regard to such sale had never, directly or indirectly, by stated contract or by acts of one accepted by the other, been given an existence; and further, that the party, the prospective purchaser furnished by plaintiff, was not at the time ready and able to complete the purchase according to the proposed terms of sale. These are all essential elements without the appearance of which, in an action of this character, the plaintiff was not entitled to recover, and the contrary finding, based on sufficient evidence, will not be disturbed. "A new trial will not be granted by the supreme court on the ground of a want of sufficient evidence to support the verdict, unless the want is so great as to show that the verdict is manifestly wrong." (*Potvin v. Curran*, 13 Neb., 302.)

It is of the assignments that the trial court erred in giving the first instruction requested for defendant. The alleged error in this instruction was that it informed the jury that the evidence, to entitle the plaintiff to a recovery, must show that the relation of principal and agent, in respect to the proposed sale of the land, existed between the plaintiff and defendant; also, that it was not applicable to the evidence. With reference to the latter, suffice it to say that it was applicable to the evidence, and in

regard to the former, when the instruction was viewed as it should be, in connection with further instructions, prepared and given at the instance of counsel for plaintiff, the jury could only understand it must appear that the relation of employe and employer existed; that plaintiff represented and did any acts alleged to have been performed by him in and about the negotiations for a sale of the land, for and in behalf of defendant, and thereby became entitled to compensation.

It is complained that it was error to give an instruction asked for defendant, that the plaintiff must establish the procurement of a purchaser ready and willing and of the financial ability to complete the purchase for the price and on the terms and conditions originally required by the owner of the land. Counsel say: "That the proposed purchaser must be able, as well as willing, to perform, we do not deny; but we contend that ability to perform is presumed, in absence of evidence to the contrary, and if inability is a defense, it must be pleaded and proven by the defendant. This instruction changed the burden of proof, which is error on the part of the court;" citing, with others, the case of *Grosse v. Cooley*, 45 N. W. Rep. [Minn.], 15, wherein it was held: "Where a real estate broker has procured a purchaser for the property of his principal, the solvency and ability of such purchaser to perform the obligations of his contract will be presumed until the contrary is proven." This is but saying that when the proof shows that a purchaser was procured who entered into a contract for the purchase of the property, a *prima facie* case has been made by the plaintiff; that the presumption will prevail that the party is able to perform. This, if the rule in this state, which we need not now decide, does not and did not conflict with what was stated in the instruction the subject of this attack. Unquestionably the plaintiff must both plead and prove the ability to perform,—must establish a *prima facie* case. What facts proven and their necessarily attendant presumptions might suffice as a performance of such task,

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if a matter demanding further instruction, devolved the duty on counsel for plaintiff, of the preparation and presentation for giving of such an instruction. This they failed to do, and the complaint, if it could have prevailed, is without force.

Error is specifically assigned of the giving, in the charge to the jury, of each of the instructions, third, fifth, and sixth, requested for the defendant. These instructions were applicable to the evidence, and when read and construed in connection with the other portions of the charge, especially those given at the request of counsel for plaintiff, were not erroneous or prejudicial to the rights of plaintiff, hence the objections to them must be overruled. No available errors have been assigned and presented, and it follows that the judgment will be

AFFIRMED.

JAMES TALCOTT, APPELLANT, V. JAMES R. C. FIELD ET AL.,
APPELLEES.

FILED FEBRUARY 16, 1897. No. 7106.

Bill of Exceptions: AUTHENTICATION. A bill of exceptions must be authenticated by the clerk of the district court to entitle its contents to consideration in an appeal to this court.

APPEAL from the district court of Gage county. **Heard** below before BUSH, J. *Affirmed.*

J. E. Cobbey, for appellant.

HARRISON, J.

The result of the trial of the issues in the district court of Gage county in this, an action instituted by appellant to subject certain property described in the petition filed to the payment of a judgment in favor of appellant against the appellees herein, was a finding and judgment

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for appellees of dismissal of appellant's action, from which an appeal has been perfected to this court.

The questions presented on appeal require an examination and consideration of the evidence adduced on the trial, or a portion thereof. What purports to be a bill of exceptions is attached to the record, but it lacks identification by the certificate of the clerk of the district court; hence the matters therein contained will not be investigated. Since the evidence is not properly before us, and without it we cannot determine the force of appellant's attack on the judgment of the trial court, such judgment must be

AFFIRMED.

EDWIN W. MOSHER V. OLIVER P. COLE ET AL.

FILED FEBRUARY 16, 1897. No. 7095.

Landlord and Tenant: ACTION FOR RENT: ATTORNTMENT. In an action for rent the defendants answered that the lessor had falsely represented that he was the owner of and entitled to control the demised premises, and thereby induced the lessees to enter into the lease, when in fact the lessor did not own the premises and was not entitled to the control thereof or to lease them, and that subsequently the defendants had attorned to and received a lease of the property from the owner, and paid the rent during the time for which it was claimed in the action to the later lessor. *Held*, That inasmuch as the lessee took possession of the premises under the lease by virtue of which the plaintiffs asserted their claim for rent due, and it not being shown that defendants had surrendered their rights under the first lease or been kept out of possession, or that there had been an eviction or its equivalent by the holder of the paramount title, there was no sufficient defense.

ERROR from the district court of York county. Tried below before BATES, J. *Reversed*.

Gilbert Bros., for plaintiff in error.

References: *Mattis v. Robinson*, 1 Neb., 3; 1 Washburn, Real Property, 361; 2 Herman, Estoppel & Res Judicata,

sec. 868; *McAusland v. Pundt*, 1 Neb., 249; *Parker v. Nanson*, 12 Neb., 419; *Denniss v. Twitchell*, 10 Met. [Mass.], 180; *Boyd v. State*, 19 Neb., 128; *Rector v. Gibbon*, 111 U. S., 276.

F. C. Power, contra.

References: *Anderson v. Smith*, 63 Ill., 129; *Mattis v. Robinson*, 1 Neb., 3; *Carter v. Marshall*, 72 Ill., 609; *Berridge v. Glassey*, 7 Atl. Rep. [Pa.], 749.

HARRISON, J.

In this case it was alleged for cause of action in plaintiff's petition that on May 9, 1892, Charles Green was lawfully possessed of certain described property in the city of York, this state, which he then leased to the defendants for the term of one year, they to pay therefor the sum of \$15 per month in advance for each and every month during the term of the lease; that on July 2, 1892, the plaintiff became the owner of the lease and entitled to the benefits thereof by virtue of an assignment executed by the lessor named in the lease; that defendants were notified of said assignment and gave their assent thereto, and promised in writing, indorsed on said lease, to make payments due thereunder to plaintiff; that defendants had defaulted in five payments due under the terms of the lease, commencing with the payment due September 10, 1892. Defendant's answer was to the effect that Charles Green was not, at the time of the execution of the lease under which the claim in this action accrued, the owner or entitled to the possession or control of the premises leased, and that he had not been since the 31st day of December, 1891, at which date the title and right of possession of said property had been decreed by the district court of York county to be in one Rachel B. Green, to the exclusion of all persons, and especially Charles Green, named as lessor in the contract of lease with defendants; that defendants were induced to enter into said contract by the false representations of Charles

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Green that he was the owner and in possession of the property to be affected thereby, and entitled to the control thereof; that long subsequent to the execution of the lease the defendants became informed of the facts in regard to the title and right to possession and control of the property occupied by them by virtue of the lease, and were notified by the agents of Rachel B. Green of her claimed rights in the premises and demand made that defendants vacate the property, and that they would be evicted unless they would attorn to Rachel B. Green and pay to her all moneys due for the use and occupation of the premises; that defendants afterward recognized and acknowledged the rights of Rachel B. Green in the premises and made such payments to her, including the amounts due for the months for which the payments are demanded in the present action. For plaintiff, in reply, there was a denial of all allegations of the answer in relation to false representations made by Charles Green, at the time of leasing, of and concerning the title to the property and the rights of possession and control thereof. There was an affirmative statement that the case was one on an appeal from the judgment of a justice of the peace, and that in the inferior court no such defense had been made of the issues tried and adjudicated. The reply also contained an admission of the rendering of the decree December 31, 1891, pleaded in the answer, but alleged the appeal thereof to the supreme court, and the approval and filing of a supersedeas bond; and further, that when the decree was rendered Charles Green was in the possession of the property; that Rachel B. Green had moved the court for a writ of possession of said premises after the rendition of the decree set forth in the answer and her motion had been overruled. A jury was impaneled and a trial of the issues had. At the close of the introduction of the evidence the presiding judge instructed the jury to return a verdict for defendants, which instruction was obeyed by that body, and in the regular course of the proceedings judgment was rendered in accordance

with the verdict. The case has been removed to this court by error proceedings on behalf of the plaintiff.

It is a general rule that a tenant cannot deny his landlord's title in an action to recover the rent moneys accrued under the terms of the lease. (Washburn, Real Property, 357*.) In the case of *Nissen v. Turner*, 50 Neb., 272, wherein an action for rent moneys due was attempted to be defended on the ground of want of title in the lessor and title in another, and false representations of lessor in regard to the title, which induced the lessee to execute the contract of lease, it was held: "To an action for rent the defendant pleaded that he had been induced to enter into the lease by the plaintiff's falsely and fraudulently representing to him that he was the owner of the demised premises, whereas in fact he was not the owner and had no authority to lease the same; that thereafter the defendant had accepted a lease from and paid rent to the true owner. Held not to state a defense, there being no averment that the lessee had not entered into possession, or that he had been kept out of possession or evicted by the holder of the paramount title, or that he had surrendered the lease." (See, also, *Parker v. Nanson*, 12 Neb., 419; *McAusland v. Pundt*, 1 Neb., 249.) The facts of the case at bar bring it directly within the rule announced in *Nissen v. Turner*; hence it must be governed thereby.

Counsel for defendant cite and rely upon the decision in the case of *Mattis v. Robinson*, 1 Neb., 3, to sustain their position in this case, and it is stated in the brief of counsel for plaintiff that it was claimed in the trial court to announce the doctrine "that a tenant can yield to a paramount title simply by notifying the landlord, without an actual surrender of possession." What was, in fact, announced in *Mattis v. Robinson*, *supra*, was the following: "Wherever there is a paramount title in a third person, who has a right thereby to the possession, and it can be done without any collusion or bad faith to the lessor, the tenant, in order to prevent being expelled by the holder of

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that title, to whom, otherwise, he would be rendering himself liable as a trespasser, may yield the possession and attorn to or take from such holder of the title a new lease, or he may abandon the possession. In neither case will he be liable to the first lessor for rent. In the former case he may resist his first lessor's claim to the possession by the new right thereby acquired. In all cases he should notify his landlord of his action." From these statements and the discussion in the body of the opinion it is clear that what is meant is that an eviction, or what is equivalent thereto, by the holder of the paramount title must occur to warrant an attornment by the tenant to such party, and this must be coupled with notice to the landlord or original lessor. The circumstances of the case at bar, as developed by the evidence, were not of a character to bring it within the doctrine of the decision in *Mattis v. Robinson*, *supra*, or, indeed, within any of the restrictions or limitations of the general rule. It follows that the charge of the trial court to the jury to return a verdict for defendants was erroneous, and the judgment based on the resultant verdict must be reversed and the case remanded.

REVERSED AND REMANDED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
V. JAMES LYON.

FILED FEBRUARY 16, 1897. No. 7128.

1. **Railroad Companies: RIGHT OF WAY: FENCES.** Section 18, article 2, chapter 2, Compiled Statutes, in which a lawful fence is defined, has no reference to the fencing of the line or right of way of a railway. The latter subject is covered or governed by the provisions of section 1, article 1, chapter 72, of the Compiled Statutes.
2. ———: ———: **EXPENSE OF FENCES: LIABILITY OF COMPANY.** A party who has given to a railway company the notice to build a fence between its right of way and his adjoining land prescribed in the proviso to section 1, article 1, chapter 72, Compiled Statutes,

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must, to be entitled to recover in an action for the reasonable expense of the erection of the fence after failure of the company so to do, show that the fence built by him along the right of way complies with the requirements of said section.

ERROR from the district court of Perkins county.
Tried below before NEVILLE, J. *Reversed.*

W. S. Morlan and J. W. Deweese, for plaintiff in error.

References: *Missouri P. R. Co. v. Youngstrom*, 27 Pac. Rep. [Kan.], 982; *Lake Erie & W. R. Co. v. Lanert*, 27 N. E. Rep. [Ind.], 324; *Pennsylvania R. Co. v. Riblet*, 66 Pa. St., 164; *Welles v. Northern C. R. Co.*, 25 Atl. Rep. [Pa.], 51.

Parsons & Logan, *contra*.

HARRISON, J.

The defendant in error brought action in the district court of Perkins county to recover the alleged value of a fence built by him along the company's line of road, or right of way, and between the land owned and occupied by him and the right of way, alleging, *inter alia*, that the company's line of road, including a portion thereof which was on the land of the defendant in error, had been constructed, open for and in use for more than six months prior to December 16, 1892; that said land was not within the limits of any city, town, or village, nor were there public road crossings or highways within or on the right of way over and across the land of defendant in error; that on the date mentioned the defendant in error served on the company a notice of the intention by him entertained to build a fence and thereby inclose his land, and requesting the company to construct a fence along its right of way on and adjoining said land; that after the lapse of more than six months immediately succeeding the service of the notice, the company having failed to build the fence along its right of way as demanded in the notice, the defendant in error procured the necessary material and erected said fence, whereby the company be-

came indebted to him in the sum of \$74.27. The answer of the company was in the following words:

"1. Denies each and every allegation in said petition contained, except the matters and facts hereinafter specifically admitted.

"2. The plaintiff has not inclosed the land mentioned in plaintiff's petition, or any part thereof, with a lawful fence, and at no time before the commencement of this action did the plaintiff intend to build around the land in plaintiff's petition described, and up to the right of way of the line of railroad operated by this defendant, a lawful fence."

To this answer there was a reply, a general denial. A jury was waived and a trial of the issues had to the court. The following stipulation of facts was filed: "It is hereby stipulated and agreed between the plaintiff and the defendant in this action, and for the purpose of this trial it is to be considered as evidence by the court, that the defendant is a corporation and the owner and operator of the railroad described in plaintiff's petition; that the plaintiff, on the 16th day of December, was the owner of the southeast quarter of section 18, township 10 north of range 39 west, in Perkins county, Nebraska, adjoining the right of way of said railroad; that said railroad crosses the above described land in a direction nearly east and west, leaving about fifty acres north of said track and the balance on the south side; that said land is not within the limits of any city, town, or village, and that there is no crossing of public roads or highways on the right of way across the said lands; that on the 16th day of December, 1892, the plaintiff served notice upon the defendant that he desired and intended to inclose his land on the adjoining right of way of the defendant on the south of the railroad with a fence, and requested the defendant to construct a fence along the right of way, as provided by section 555, page 192, of the Consolidated Statutes of Nebraska. The plaintiff constructed a fence around his land up to the right of way of the defendant,

consisting of two wires attached to the posts set two rods apart; that this was the very same kind of fence he intended and the only kind of fence he intended to build at the time he served the notice; that he constructed along the line between the railroad and the land above described a fence composed of posts and four wires; wires attached to posts sixteen feet apart, with stays midway between, the top wire being four and one-half feet from the ground and the bottom wire one and one-half feet from the ground, and two other wires equal distance between the top wire and the bottom wire. The fence so constructed along the right of way of the railroad is not a fence suitable and amply sufficient to prevent hogs from getting on the railroad. That the prices of the material used and the labor performed in constructing the fence along the railroad by the plaintiff set forth in the petition are the reasonable prices and value thereof, and that no part of the amount claimed has been paid; that more than six months elapsed from the 16th day of December, 1892, the date of the service of the notice, and the defendant failed to erect said fence as required by said notice, and that after the six months elapsed the plaintiff built the fence above described."

Of the oral evidence we will quote the following portion:

Q. I will ask you to state, if you know, if the fence built by you along the right of way of the railroad crossing your land, as mentioned in this stipulation, was like other fences built by the railroad company crossing other lands in this county and vicinity.

A. It was; more than the posts that I got wasn't as large as other posts. The posts were the same distance apart, same number of wires, and the wires the same distance apart.

The action was instituted under the provisions of section 1, article 1, chapter 72, Compiled Statutes, 1895, which took effect as a law June, 1867, and a proviso thereto, passed during the legislative session of 1883.

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The section and proviso read as follows: "That every railroad corporation whose lines of road or any part thereof is open for use shall, within six months after the passage of this act, and every railroad company formed or to be formed, but whose lines are not now open for use, shall, within six months after the lines of such railroad or any part thereof are open, erect and thereafter maintain fences on the sides of their said railroad or the part thereof so open for use, suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, with opens, or gates, or bars at all the farm crossings of such railroads for the use of the proprietors of the lands adjoining such railroad, and shall also construct, where the same has not already been done, and hereafter maintain at all road crossings, now existing or hereafter established, cattle guards suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting onto such railroad, and so long as such fences and cattle guards shall be made after the time hereinbefore prescribed for making the same shall have elapsed, and when such fences and guards, or any part thereof, is not in sufficiently good repair to accomplish the objects for which the same is herein prescribed, is intended, such railroad corporation and its agents shall be liable for any and all damages which shall be done by the agents, engines, or trains of any such corporation, or by the locomotives, engines, or trains of any other corporations permitted and running over or upon their said railroad, to any cattle, horses, sheep, or hogs thereon; and when such fences and guards have been fully and duly made, and shall be kept in good and sufficient repair, such railroad corporation shall not be liable for any such damages, unless negligently or willfully done; *Provided, however,* That any person, company, or corporation owning land adjoining the right of way of any railroad company in this state, and not within the limits of any town,

village, or city, and intending to inclose his or their land, or any part thereof, that adjoins such right of way or railroad, with a fence, such person or the secretary of such company or corporation, by direction thereof, may notify in writing such railroad company of such intention and request such railroad company to build a lawful fence as described in this section, on the line between their railroad and the land intended to be inclosed. Such notice shall definitely specify two points on such line between which points such fence is requested to be erected, and describe the field intended to be inclosed. The railroad company shall, within six months after receiving such notice, cause to be erected the fence required by such notice, and in case of a failure so to do the party so giving notice as aforesaid may cause such fence to be erected, at a reasonable cost, and collect the amount thereof from the railroad company so neglecting to erect the fence."

There was some discussion in the briefs as to the kind of a fence to be erected to fulfill the requirements of the section of the statute we have just quoted, and it was urged in behalf of the company that the erection of such a fence as is described in section 18, article 2, chapter 2, Compiled Statutes, as a lawful fence, is what is demanded by the provisions of section 1, article 1, chapter 72; but this is not necessarily true, and that the fence prescribed and described in section 18, article 2, chapter 2, is what may be denominated a lawful fence when made for the mere inclosure of land does not authorize the conclusion that it is the fence meant and required in section 1 of chapter 72. It could not be so unless it was according to the terms of the last mentioned section, as a structure "suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad," or, expressed in other words, to bar or inclose such animals: This question was considered and decided by this court in the case of *Chicago, B. & Q. R. Co. v. James*, in an opinion written by MAXWELL, J., reported in 26 Neb., 188. It was

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announced: "The provisions of section 18, chapter 2, Compiled Statutes, defining a lawful fence, apply alone to the inclosing of lands, and do not apply to the fencing of a railway. That matter is governed by section 1, article 1, chapter 72, Compiled Statutes." It is true that the material to be used and the form and manner of construction of the fence are not set out in terms, or even indicated, in section 1 of chapter 72, but doubtless a fence could be devised and erected, if the desire existed so to do, which would be reasonably ample and sufficient to inclose either or all of the specified animals, or bar the progress of either in any particular direction.

One contention on the part of the company is that the fence built by the defendant in error, the expense thereby incurred being the amount sought to be recovered herein, and for which he was given judgment, was not such a fence as is exacted by the section of the statutes under which the claim is asserted, and that this is disclosed by the stipulated statement of the facts, wherein it was said: "The fence so constructed along the right of way of the railroad is not a fence suitable and amply sufficient to prevent hogs from getting on the railroad;" that in order to entitle the defendant in error to be paid for making the fence it must have been such a structure as was required by the law under which the claim is presented. The statute prescribed that the fence must be suitably and amply sufficient to prevent certain designated animals, including hogs, from getting on the railroad, and also that the person, owner of and intending to inclose land through or over which the company's road extended, might give the company written notice of such intention and request it to build a "lawful fence as described in this section on the line between the railroad and the land intended to be inclosed," and if the company failed to comply with the request of the notice within six months after its service the party might cause such a fence to be erected, at a reasonable cost, and collect the amount of such cost from the company, from all of which

it is clear that the fence erected by the party claiming to collect the amount of its cost from the company, by reason of the company's neglect to build the fence within the statutory time after such notification, must be such a fence as meets the requirements of the statute under which the claim is made. And it further appears that the fence, on the erection of which this suit is predicated, was not such an one, for the reason that it would not turn or inclose or prevent hogs from getting on the railroad; hence no cause of action accrued and the judgment rendered was erroneous.

It is urged in this connection, in behalf of defendant in error, that the fence which he built was similar to the fences erected by the company along the line of its right of way, to meet the demands of the statute and of parties in statutory notices served in regard to such fences; that inasmuch as in building the fence, the cost of which he seeks to recover herein, he followed the pattern set by the company, it should be sufficient, although not so in contemplation of the statute. If the company has erected, or caused to be erected, fences which were lacking in the particular in which it is stipulated the one built by defendant in error was deficient, then it has, in so doing, not complied with the statute, and in each instance could not successfully allege its action as a compliance with the law; but its failure can furnish no reason for allowing to the defendant in error a recovery on an incomplete performance of the statutory requirements in regard to the kind of a fence to be erected. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

ABRAHAM RACHMAN ET AL. V. J. F. CLAPP ET AL.

FILED FEBRUARY 16, 1897. No. 7022.

1. **Sales: PAYMENT OF ANTECEDENT DEBT.** A bill of sale received in payment of an antecedent debt protects the vendee to the same extent as had there been a new consideration, if taken in good faith and without an intention to defraud the other creditors of the vendor.
2. **Attachment: SERVICE OF PROCESS.** Jurisdiction over attached property is not lost by failure to serve process in the main case so long as the action remains pending. (*Darnell v. Mack*, 46 Neb., 740.)

ERROR from the district court of Douglas county.
Tried below before SCOTT, J. *Reversed.*

Kennedy, Gilbert & Anderson, and C. P. Halligan, for plaintiffs in error.

B. N. Robertson, Martin Langdon, Cavanagh & Thomas, Rich, O'Neill & Sears, and McClanahan & Halligan, contra.

NORVAL, J.

This was a suit in replevin to recover a stock of groceries, store fixtures, and other personal property. A separate verdict was returned in favor of each defendant covering different portions of the chattels, and from the judgments rendered thereon, plaintiffs have prosecuted error proceedings to this court.

Plaintiffs claim to be the absolute owners of the property in controversy, while the defendants seized the same under certain writs of attachment issued against H. S. Rachman, plaintiffs' son, who at one time was the owner of the chattels, and the defendants insist that he had not parted with his title thereto at the time the levies in question were made. The disputed question of fact in the case was: Did the plaintiffs, or their son, own the property? It is undisputed that one Milford E. James

was the owner of a grocery stock and fixtures located at 1921 Sherman avenue, in the city of Omaha, which on the 1st day of September he sold and conveyed by bill of sale to B. Rachman, one of the plaintiffs, and on the same day the latter, by bill of sale, conveyed the same property to her son, the said H. S. Rachman, who immediately took possession and carried on the business, until January 27, 1893, replenishing the stock from time to time by purchases. On the date last aforesaid, the son conveyed to the plaintiffs, by bill of sale, the stock then on hand, the fixtures and some other chattels, the same being the property now involved in this suit, in payment of an indebtedness of something less than \$1,400, the larger portion of which represented the amount due from H. S. Rachman to his mother for the original purchase price of the goods. Just preceding the last transfer the stock was inventoried by the father, his son, and two clerks of the latter, consuming in doing so one day and a part of one night. The bill of sale was filed for record in the office of the county clerk, and possession of the property taken by the plaintiffs. Subsequently, the several writs of attachment were issued and levied thereon. The son was insolvent at the time. The defendants introduced testimony tending to show that one of the plaintiffs, Abraham Rachman, at the time the levies were made, stated that he had always owned the stock of goods and that the son was conducting the business for the father; also, that he, Abraham, told the defendant Clark that the son owned the horses levied upon. The latter alleged statement is denied by Abraham, but the other stands uncontradicted. The record discloses that immediately prior to the making of the last bill of sale McCord, Brady & Co. sold on time and delivered to H. S. Rachman twenty sacks of flour, which have never been paid for. Upon this feature of the case the court gave the following instruction to the jury, which is assigned as error:

"If you find from the evidence that the twenty sacks of flour were purchased a short time before the date

when the plaintiff claims to have bought the property back from his son, * * * and you further find that the defendant has shown by a preponderance of the evidence that the twenty sacks of flour were the property of the intervenors, McCord, Brady & Co., and that the same has not been paid for and the value thereof, then your verdict should be for the intervenors, McCord, Brady & Co., upon their petition of intervention as to the twenty sacks of flour. And you are further instructed that if when this flour was purchased by H. S. Rachman, whether he was the actual owner of the store or not, if he was in failing circumstances, unable to meet his obligations, and you further find that the plaintiffs knew that fact, or had reason to know the fact; that is, if a reasonably cautious and prudent man would have known the fact that H. S. Rachman purchased the grocery, including the flour, if you find he did purchase it back, that H. S. Rachman was indebted, and unable to pay his debts, or, if you further find that at the time of the alleged purchase by Abraham Rachman he took it back, took the store back for an antecedent debt, knowing, or having reason to know, if he did know or have reason to know that H. S. Rachman was in failing circumstances and unable to pay his debts, such transaction on the part of Abraham Rachman would not give him the right of possession of this flour as against McCord, Brady & Co., if they have established the facts as I have stated they are required to."

This instruction was erroneous and prejudicial. There was no evidence to show that McCord, Brady & Co. owned the flour in controversy; hence it was error to assume that there was evidence before the jury from which they could find the existence of such ownership. It was a fact that the flour was sold to young Rachman recently before the transfer to plaintiffs and payment therefor had not been made, but such fact alone did not authorize said firm to obtain possession of the property, or constitute it the owner thereof. Nor is it the law that the plaintiffs were

not entitled to the possession of the flour because H. S. Rachman was in failing circumstances; that plaintiffs had notice thereof or of facts sufficient to put them upon inquiry and that they took the stock, including the flour, in satisfaction of debt then due them from their son. It is a well recognized principle of law in this state, that a pre-existing debt is a good consideration for a conveyance of property, and if it was taken in good faith and without any fraudulent purpose it will be upheld even though the consideration therefor was an antecedent debt. (*Ward v. Parlin*, 30 Neb., 376; *Chaffee v. Atlas Lumber Co.*, 43 Neb., 224; *State Bank of Lushton v. Kelley Co.*, 49 Neb., 242; *Steen v. Stretch*, 50 Neb., 572.) There was ample evidence to authorize a finding that the bill of sale to plaintiffs was executed in good faith, without any intention on their part to defraud the other creditors of the grantor, and we cannot say that the jury would not have so found had it not been for the above portion of the charge of the court.

Counsel for plaintiffs assail the fifth instruction, which reads as follows:

"5. You are further instructed that if you find from the evidence that there was a bill of sale executed by Henry S. Rachman to his mother for this property, or any portion of it, involved in these proceedings, and such bill of sale was never recorded, and you further find that these parties who gave credit to Henry S. Rachman had no actual knowledge of the existence of such bill of sale, and gave credit to Henry S. Rachman not knowing such instrument to be in existence, such instrument is a fraud, and would be a fraud upon the creditors who in good faith gave Henry S. Rachman credit on the belief that no such instrument in fact existed. It is admitted that exhibit number '4' was never recorded, and that is the instrument alluded to in this instruction."

The foregoing was erroneous for the reason, among others, plaintiffs did not predicate title upon the bill of sale dated September 1, 1890,—the one alluded to in the

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charge,—but upon the one executed January 27, 1893; hence the creditors of Henry S. Rachman were not prejudiced by the existence of the bill of sale of the date first aforesaid.

Lastly, it is urged that the attachment proceedings were invalid because no service of summons was ever obtained upon the defendant in the main actions in which the attachments were sued out. We have held the opposite to be true in *Darnell v. Mack*, 46 Neb., 740, which decision was right, and is adhered to. Judgment reversed, and cause remanded for a new trial.

REVERSED AND REMANDED.

GEORGE M. MONTGOMERY ET AL. V. ALBION NATIONAL
BANK.

FILED FEBRUARY 16, 1897. No. 6929.

1. **Usury: PAYMENT: SET-OFF.** Money paid to a national bank as usurious interest on a loan of money cannot be set off in a suit brought by it to recover the principal debt more than two years after such payment was made. *Norfolk Nat. Bank v. Schweuk*, 46 Neb., 381, and *Lanham v. First Nat. Bank of Crete*, 46 Neb., 663, followed.
2. **Review: ASSIGNMENTS OF ERROR.** The question as to whether there was error in the assessment of the amount of recovery will not be considered unless raised by a proper assignment of error.
3. ———: **CONFLICTING EVIDENCE.** Questions of fact determined upon conflicting evidence will not be reviewed in this court.
4. **Usury: COSTS: ATTACHMENT.** Where, in an action on a promissory note, the defense of usury is established, the defendant is entitled to recover his costs, and such recovery applies to costs incurred in the suing out of an attachment in the case.

ERROR from the district court of Boone county. Tried below before HARRISON, J. *Modified.*

F. S. Howell and Montgomery & Hall, for plaintiffs in error.

J. A. Price, contra.

NORVAL, J.

This was an action upon a promissory note for \$2,700 executed by the defendants below under the firm name of Montgomery & Jaycox, and delivered to the Albion National Bank. The defense was usury, thirteen payments of illegal and usurious interest of \$16.50 each being set up in the answer in as many counts thereof. The bank filed a general demurrer to the several counts of the answer, which was overruled as to the first three defenses and sustained as to the others. From a judgment against the defendants they prosecute error.

It is argued that there was reversible error in sustaining the demurrer to the last ten grounds of defense contained in the answer. The defendants sought to have applied, by way of set-off against the note, the several payments of illegal or usurious interest actually paid the bank on the loan. The district court ruled they were not entitled to do so, which is in accord with the doctrine recognized and applied in *Norfolk Nat. Bank v. Schwenk*, 46 Neb., 381, and *Lanham v. First Nat. Bank of Crete*, 46 Neb., 663. In the opinion in the last case it was said "that usurious interest paid a national bank on a note cannot be set off in an action upon such note, and that the federal statute alone determines the penalties that shall be visited upon such banking institutions for exacting and receiving illegal interest; that is, if illegal interest has been contracted for and not paid, the bank forfeits all interest; but if illegal interest has been paid to a national bank, the borrower may recover double the amount thereof, providing his action is commenced within two years from the time the usurious transaction occurred; further, that the borrower may not set off in an action on

the note either the amount of usurious interest paid thereon, or double the sum so paid, more than two years before the action was instituted." The answer shows that all the payments of usurious interest, excepting the first three, were made more than two years prior to the bringing of this suit; and furthermore, that an action has been instituted by the defendants against the bank under the Revised Statutes of the United States to recover double the amount of usurious payments, and said suit is still pending and undetermined. In view of these facts, there was no error in sustaining the demurrer.

The note in controversy was taken in renewal of two other notes given by the defendants for \$1,500 and \$1,200 respectively. The one for the larger sum was tainted with the vice of usury, while as to the other no usury is claimed. It is insisted that the merging of those two notes into the one under consideration affected the latter with the usurious taint, and prevents the recovery of interest on any portion of the principal sum; therefore, the court below erred in allowing interest on \$1,200 of the debt. Whether this is true or not we refrain from deciding, since no complaint has been made in the petition in error that the assessment of the amount of the recovery was excessive. (*Beavers v. Missouri P. R. Co.*, 47 Neb., 761; *Barmby v. Wolfe*, 44 Neb., 77.)

Another contention is that there was error in overruling the motion to discharge the attachment, which was based upon two grounds—the insufficiency of the affidavit on which the attachment was issued, and that the statements therein contained are untrue. The latter ground alone is relied upon in this court. The motion to dissolve was heard upon conflicting affidavits, and the decision being supported by evidence tending to show that at least one of the statutory grounds for an attachment existed, the ruling will not be molested.

Finally, it is argued that the court erred in rendering judgment in favor of the bank for the costs made on the attachment. All other costs were taxed to it. The note

for \$1,500, already mentioned, was executed and delivered by the defendant to Thompson & Barker, who, after the receipt of three payments of illegal interest, indorsed the note to the Albion National Bank. The latter was a purchaser with notice of the usurious contract. Section 5, chapter 44, Compiled Statutes, declares: "If a greater rate of interest than is hereinbefore allowed shall be contracted for or received or reserved, the contract shall not, therefore, be void, but if in any action on such contract proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall only recover the principal, without interest, and the defendant shall recover costs." By virtue of the foregoing provision, when the defense of usury is established, in any action, the defendant is entitled to recover his costs, even though the plaintiff obtains judgment. The statute has made no exception as to costs made in an ancillary proceeding before judgment, as in case of attachment, and the court can make none. It is said that this bank is a creature of the law of the general government and is liable alone to penalties imposed by the federal statute relating to usurious contracts. As a general proposition that could be safely conceded as to usurious contracts made with national banks, and in this case such rule has been applied as to all usurious interest contracted for and received by the bank on the \$1,500 note. But the question of costs in the case at bar is controlled by the state statute above quoted, since the note is tainted with the vice of usury in its inception, and was not delivered to the bank originally, but it subsequently became the owner thereof by purchase, with notice of the usurious transaction. The fact that the costs grew out of the attachment proceedings, and were not made in proving or disproving the charge of usury, is immaterial. (*Cattle v. Haddox*, 17 Neb., 307; *Rodgers v. Graham*, 36 Neb., 730.)

The judgment, in so far as it awarded the bank the costs which accrued in the attachment, is reversed and a

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judgment for defendants below will be entered for the amount of their costs in the attachment. In all other respects the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

HARRISON, J., not sitting.

D. E. HOLMES, APPELLEE, V. ELSIE E. HULL, APPELLANT,
ET AL.

FILED FEBRUARY 16, 1897. No. 7003.

1. **Mortgages: ACKNOWLEDGMENT: WITNESSES.** A mortgage upon real estate, other than the homestead, executed and delivered by the mortgagors is valid between the parties and those having knowledge of its existence, although not lawfully acknowledged or witnessed.
2. **Married Women: MORTGAGES.** A married woman may, by a mortgage duly executed and delivered, bind her separate property for the payment of a loan of money made to her husband, to the extent of the property covered by such mortgage.
3. ———: ———: **CONSIDERATION.** The loan to the husband is a sufficient consideration for the execution of the mortgage.

APPEAL from the district court of Kearney county.
Heard below before BEALL, J. *Affirmed.*

J. L. McPheely, G. L. Godfrey, and J. M. Stewart, for appellant.

Ed L. Adams, contra.

NORVAL, J.

The defendants are wife and husband. The defendant husband borrowed of plaintiff, through his agent, J. A. Cline, the sum of \$2,500, which loan was evidenced by promissory notes signed by both husband and wife, and the payment thereof was secured by a real estate mort-

gage given by them upon the separate property of the wife. Plaintiff's agent had full knowledge of the ownership of the mortgaged property at the time the loan was negotiated, and the money was paid over to the husband. No portion of the \$2,500 ever came into the hands of the wife, nor was any part thereof used or expended in any way whatever for the benefit or improvement of her separate estate, trade, or business. From a decree foreclosing said mortgage the wife appeals.

It is urged that the mortgage is invalid, because the execution thereof was not witnessed by a competent person, and that the notary who certified to the acknowledgment was disqualified to act by reason of his being the agent of the lender. The sole witness to the execution of the instrument was the said J. A. Cline, and he was likewise the officer who took the acknowledgment. Whether the fact that Mr. Cline was the agent of the mortgagee in making the loan is sufficient to render him incompetent to either witness the mortgage or take the acknowledgment it is unnecessary to decide, although it would seem that the decisions of this court would justify the conclusion that Mr. Cline did not possess such an interest in the subject of the instrument as to disqualify him from signing as a witness or taking the acknowledgment of the mortgagors. (See *Child v. Baker*, 24 Neb., 188; *Horbach v. Tyrrell*, 48 Neb., 514; *Havemeyer v. Dahn*, 48 Neb., 536.) It is neither alleged nor proved that the mortgaged premises were at the time occupied by the defendants as a homestead. The evidence shows the opposite to be the fact; therefore the acknowledgment of the mortgage by them before an officer empowered by law so to do was not essential to the validity of the instrument. It was valid as between the parties though it had never been witnessed or acknowledged. This doctrine has been too frequently asserted by this court to require more than the citation of the cases in which it has been announced. (*Burbank v. Ellis*, 7 Neb., 156; *Kittle v. St. John*, 10 Neb., 605; *Green v. Gross*, 12 Neb., 123; *Harrison v.*

McWhirter, 12 Neb., 152; *Missouri Valley Land Co. v. Bushnell*, 11 Neb., 192; *Keeling v. Hoyt*, 31 Neb., 453; *Connell v. Galligher*, 39 Neb., 793; *Pearson v. Davis*, 41 Neb., 608.) The evidence is clear and undisputed that Elsie E. Hull signed the notes and mortgage, but whether she executed them with her free and voluntary act the witnesses do not agree. Each of the defendants testified that she signed them under protest, while Mr. Cline's testimony is quite emphatic that the execution of the papers on her part was entirely free and voluntary, and without any compulsion or coercion on the part of any one. The finding of the court as to the execution and delivery of the mortgage being sustained by sufficient evidence, it will not be disturbed.

It remains to be considered whether the plea of coverture is a good defense against this mortgage. Stated differently, is a wife's separate estate liable for the payment of a mortgage executed by her to secure the payment of a loan obtained by her husband for his own use and benefit, when no part of the money thus procured was expended in and about her separate estate, trade, or business? The statute of this state relative to married women has been frequently before this court for consideration, but it is unnecessary for us to review the decisions on the subject at this time. Appellee strenuously insists that the statute does not confer upon a married woman an unrestricted power to enter into contracts, but the right to do so is confined to those made with reference to and upon the faith and credit of her separate property, trade, or business. Counsel for appellant do not controvert the soundness of the rule just stated, but they insist that a contract is not made in reference to a married woman's separate estate, trade, or business unless such contract related to or concerned the same, and that the consideration passed to her for the benefit of her separate property, trade, or business. If the question was an open one in this state the writer would be inclined to adopt that as the proper construction of the statute, but the

point has been set at rest by judicial construction of so long standing as to bar our investigating the subject anew. It has been decided that a married woman may, by mortgage duly executed and delivered, bind her individual property for the payment of another's debt, to the extent of the property covered by such mortgage. (*Stevenson v. Craig*, 12 Neb., 464; *Nelson v. Bevins*, 19 Neb., 715; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb., 123; *Watts v. Gantt*, 42 Neb., 869.) The loan to the husband was a sufficient consideration for the mortgage, and it having been made upon the faith and credit of Mrs. Hull's individual property, the same is liable for its payment. The decree will be

AFFIRMED.

CARPENTER PAPER COMPANY, APPELLEE, v. J. C. WILCOX
ET AL., APPELLANTS.

FILED FEBRUARY 16, 1897. No. 7051.

1. **Mortgages: DESCRIPTION: MISTAKE: REFORMATION.** A mutual mistake in the description of property mortgaged is sufficient to justify the reformation of the instrument by a court of equity, not only as against the mortgagors, but also as against purchasers under them chargeable with notice of such mistake.
2. **Bona Fide Purchasers.** A *bona fide* purchaser of land is one who purchases for a valuable consideration, paid or parted with, without notice of any suspicious circumstances to put him upon inquiry.
3. **Mortgages: ERRONEOUS DESCRIPTION.** A mortgage of real estate will not be invalidated by reason of an error in the description of the property in case the remainder of the description, after rejecting the erroneous portion, is sufficiently definite to enable the land to be located. (*Hubermann v. Evans*, 46 Neb., 784.)
4. —: **REFORMATION: EVIDENCE.** Evidence examined, and held sufficient to justify the reformation of a mortgage on the ground of a mutual mistake in describing the property intended to be incumbered.

APPEAL from the district court of Douglas county.
Heard below before AMBROSE, J. *Affirmed.*

David Van Etten and Sherman Wilcox, for appellants.

L. D. Holmes and Byron G. Burbank, contra.

NORVAL, J.

This was an action in equity to reform a mortgage on the ground of an alleged mutual mistake in said mortgage, and for a decree of foreclosure thereon as reformed. A decree was entered in favor of plaintiff, from which defendants appeal. A reformation of the instrument was asked for on the ground of an alleged mistake of the scrivener in describing the property intended to be incumbered. The decree is assailed on the ground that it is unsupported by the evidence. The proofs submitted on the trial tend strongly to establish the following facts: Jeremiah C. Wilcox, one of the defendants, on the 20th day of October, 1891, executed and delivered to plaintiff his promissory note for \$5,966.28, due in eight months thereafter, with interest at ten per cent, and the payment thereof was to be secured by a real estate mortgage. At that time said Wilcox was the owner of the following described real estate situate in Douglas county, to-wit: "Commencing at a point 852 feet north and 425 feet east of the quarter-section corner, on the west line of section 34, township 15 north, range 13 east, being on the south side of Green street, thence south $134\frac{1}{2}$ feet; thence east 175 feet; thence north $134\frac{1}{2}$ feet; thence west 175 feet to the beginning, being a tract on the east side of Twenty-third street and the south side of Green street. Also a piece of land described as follows: Commencing at a point $247\frac{1}{2}$ feet south of the northwest corner of the tract last above described, thence south 130 feet; thence east 175 feet; thence north 130 feet; thence west 175 feet to the beginning, being a tract of land fronting on Boulevard street." Pursuant to said agreement, on the same date the said Wilcox and Perlia J. Wilcox, his wife, by her attorney in

fact, the said Jeremiah C. Wilcox, executed a mortgage to secure the payment of said promissory note, the premises being described in said mortgage as above set forth, with the exception that the number of the section was designated as "3" instead of "34." The mortgage was prepared by L. D. Holmes, plaintiff's attorney, and it is insisted that he inadvertently described the premises as lying in section 3 when in lieu thereof section 34 should have been written in the mortgage. There is no pretense that Mr. Wilcox owned any land in section 3 of the town and range mentioned in the mortgage, and he testified that he did not own any real estate therein, while he was then the owner of the property here in dispute, situate in the said section 34. No disinterested person can read the testimony contained in the bill of exceptions without reaching the conclusion that there was a mutual mistake in describing the premises in the mortgage. It would be a reflection upon the integrity of Mr. Wilcox to hold that he intentionally mortgaged property he did not own,—an imputation not warranted by the evidence before us. The record discloses that Mr. Wilcox furnished plaintiff, prior to the drafting of the mortgage, an abstract of the title of the property upon which security for the payment of the note was to be given, and to which abstract was attached a plat of the premises, showing their location as described in the mortgage with the single exception that the number of the section was stated on the plat to be "34" instead of "3." This abstract and plat were produced by the plaintiff on the trial and introduced in evidence, and they have been preserved by the bill of exceptions. Mr. Wilcox, although examined as a witness, did not deny in his testimony that an error was made in the description by the draftsman of the mortgage. That the mistake as contended was made we entertain no doubt. That the description of the premises in a mortgage may be reformed by a court of equity on the ground of mutual mistake of the parties is firmly established by the adjudications of

this court. (*Palmer v. Windrom*, 12 Neb., 494; *Parker v. Starr*, 21 Neb., 680.) It is unnecessary to cite the decisions of the courts of our sister states affirming the same doctrine.

It is urged that the decree as to Perlia J. Wilcox should be reversed—First, because she never authorized her husband to affix her name to the mortgage in controversy; and second, that, she not having been present when the instrument was executed, the error in the description was not a mistake with which she is chargeable. Neither of the contentions is well founded. It is undisputed that Mr. Wilcox, at the time the mortgage was given, held a general power of attorney from his wife, duly executed by her, authorizing him, among other things: "To incumber, by mortgage or otherwise, all or any part of any real estate, or any interest therein, I have or ought to have in the state of Nebraska." This conferred ample authority upon Jeremiah C. Wilcox to execute a mortgage in the name of Mrs. Wilcox, upon any part of her real estate in this state, or in which she had any interest. If she had no interest whatever in the property in controversy, as insisted in the brief, clearly she is not prejudiced by the decree. It is unimportant that Mrs. Wilcox was not present when the mortgage was given. The mistake of her attorney in fact is, in law, her own. The error in the description as between the parties to the mortgage should be reformed.

There remains to be considered the question whether the mortgage can be corrected as against the defendants, the South Side Real Estate & Building Company, a corporation, and Sherman Wilcox. The latter is a son of the said Jeremiah C. and Perlia J. Wilcox. The answer admits that the three Wilcoxs were the exclusive stockholders in the said company. Subsequent to the execution, delivery, and recording of the mortgage under consideration, the said Jeremiah C. Wilcox and his wife conveyed to the said South Side Real Estate & Building Company, subject to existing incumbrances of record, the

real estate intended to be covered by said mortgage. While a mutual mistake will not be corrected in equity as against innocent third parties, it is the settled law that a mistake in the description of the premises in a mortgage or deed will be reformed not only as against the parties to the instrument but also as against subsequent purchasers chargeable with notice of such mistake. (*Gouverneur v. Titus*, 6 Paige Ch. [N. Y.], 347; *Whitehead v. Brown*, 18 Ala., 682; *Wall v. Arrington*, 13 Ga., 88; *White v. Wilson*, 6 Blackf. [Ind.], 448; *Simmons v. North*, 3 S. & M. [Miss.], 67; *Strang v. Beach*, 11 O. St., 283.) Applying the foregoing rule to the facts in the case it is obvious that the mortgage can be reformed as against the South Side Real Estate & Building Company; since it was not a purchaser of the real estate for value without notice of the imperfection in the description in the mortgage. It was established on the trial beyond dispute that one of the tracts intended to be mortgaged to plaintiff is bounded on the north by a public highway known as "Green street," and on the west by a public thoroughfare known as "Twenty-third street;" that the other piece is also bounded on the west by said Twenty-third street, and on the south by Boulevard street; that both Green and Boulevard streets have been for many years, and were, at the time the mortgage was given, used by the traveling public as highways, and recognized as streets. Rejecting entirely the portion of the description contained in the mortgage which was untrue, namely, the number of the section, and the remainder of the description therein contained was sufficiently definite to render the point of commencement and the location of the premises susceptible of ready ascertainment by any one acquainted with the locality, or by a competent surveyor, and to have charged any purchaser of the property with notice which the record of this mortgage afforded. The description as written in the mortgage, after rejecting the erroneous portion thereof, as we must, under the rule laid down in *Hubermann v. Evans*, 46 Neb., 784, and *Woods v. Hart*, 50

Neb., 497, clearly shows that the starting point for the location of the first tract mentioned in the mortgage is the east intersection of Twenty-third street with the south line of Green street, and that said tract extended thence east 175 feet along the south side of said street, and also extended from said initial point south $134\frac{1}{2}$ feet along the east side of said Twenty-third street. There is no difficulty in locating the second piece, from the description as written in the mortgage, since it is described by courses and distances as "commencing at a point $247\frac{1}{2}$ feet south of the northwest corner of the tract last above described, * * * being a tract of land fronting on Boulevard street." The mortgage contained a sufficient description of the property to prevent the South Side Real Estate & Building Company from becoming an innocent purchaser of the property. Besides, it was put upon inquiry by the clause in the deed: "Subject to all existing incumbrances of record." Moreover, the record fails absolutely to show that the company ever paid or promised to pay a dollar for the land; therefore it is not entitled to the protection which the law throws around a *bona fide* purchaser for value. (*Veith v. McMurtry*, 26 Neb., 341; *Savage v. Hazard*, 11 Neb., 323.)

As to the defendant Sherman Wilcox, it is sufficient to say that he is not a purchaser of any portion of the property in controversy, inasmuch as he is merely a stockholder in the South Side Real Estate & Building Company, and whether he paid value for his stock is not important to the question before us. The decree is right and is accordingly

AFFIRMED.

PETER ROCCO ET AL. V. B. FRAPOLI ET AL.

FILED FEBRUARY 16, 1897. No. 7075.

1. **Contracts: PUBLIC POLICY.** Courts will refuse to enforce contracts which are manifestly contrary to public policy or sound morals. Following *Wilde v. Wilde*, 37 Neb., 891.
2. **Unlawful Sale of Liquor: CONTRACTS.** A contract for commission sales of intoxicating liquors in this state by one as agent of another, neither of whom has been licensed as required by the statutes of this state, is void as against public policy, and a breach of such contract cannot be made to serve as the basis for a judgment between such parties.

ERROR from the district court of Douglas county.
Tried below before SCOTT, J. *Reversed.*

G. W. Shields, for plaintiffs in error:

The court will not enforce an illegal contract, either by specific performance or by allowing damages for its breach. (*Gould v. Kendall*, 15 Neb., 549; *Hobbie v. Zaepffel*, 17 Neb., 536; *Gipps Brewing Co. v. De France*, 58 N. W. Rep. [Ia.], 1087; *Kraut v. State*, 47 Ind., 519; *Shaw v. State*, 56 Ind., 188; *Pickens v. State*, 20 Ind., 116.)

McCabe, Wood, Newman & Elmer, contra:

Where two parties enter into a contract to do a thing prohibited by law, not inherently wrong, but *malum prohibitum*, that party to the contract who is more guilty cannot, after availing himself of the proceeds realized under the contract, assert its illegality against the other party, who is less in the wrong, seeking relief under the contract. (*Bateman v. Robinson*, 12 Neb., 509; *Lowell v. Boston & L. R. Co.*, 23 Pick. [Mass.], 24; *Atlas Bank v. Nahant Bank*, 3 Met. [Mass.], 581; *White v. Franklin Bank*, 22 Pick. [Mass.], 181; *Schermerhorn v. Talman*, 14 N. Y., 93; *Carkins v. Anderson*, 21 Neb., 364; *McBlair v. Gibbs*, 17 How. [U. S.], 237; *Brooks v. Martin*, 2 Wall. [U. S.], 70;

Rocco v. Frapoli.

Wann v. Kelley, 2 McCrary [U. S.], 628; *Planters Bank v. Union Bank*, 16 Wall. [U. S.], 483.)

An agent who has received money from or in behalf of his principal cannot defeat an action, brought by the principal to recover it, upon the ground that the contract under which the money was paid, or the transaction from which it was realized, or the purpose to which it was to be devoted, was illegal. (*United Protestant Church v. Stegner*, 21 O. St., 488; *Manhattan Ins. Co. v. Ellis*, 32 O. St., 388; *Snells v. Pells*, 113 Ill., 145; *Kiewert v. Rindskopf*, 46 Wis., 481; *Baldwin v. Potter*, 46 Vt., 402; *Evans v. City of Trenton*, 24 N. J. Law, 764.)

RYAN, C.

There was a judgment in this case in the district court of Douglas county in favor of the defendants in error for the sum of \$400. It was averred in the petition in said court that the defendants in error, in the month of October, 1890, had consigned from California to the plaintiffs in error, who were commission merchants in Omaha, a car load of wines and brandy; that by the terms of the agreement between the parties to such shipment the defendants in error were to pay the plaintiffs in error ten per cent commission on the amount sold by the plaintiffs in error; that the wines and brandy had either been sold or the plaintiffs in error had negligently neglected to sell the same, and, therefore, should be held to account to the defendants in error for the value of such consignment; that there had been paid but \$470.15, and that the reasonable value of the liquors unaccounted for was \$1,350.71, for which judgment was prayed. Among the defenses pleaded by the plaintiffs in error was that in the following language: "For further answer to said petition these defendants allege that all of the said goods described in said petition and consigned by plaintiffs to these defendants were spirituous and vinous liquors; that by the terms of said contract said goods were to be sold in the city of Omaha, Nebraska, by these defendants

Iowa Loan & Trust Co. v. Walker.

as agents for the plaintiffs, and the defendants allege that neither the said plaintiffs nor said defendants ever had or obtained a license from the state of Nebraska, the county of Douglas, or the city of Omaha, nor any of the officers thereof, to sell said liquors, and that the said goods were delivered by the said plaintiff in accordance with the said contract to the said defendants in the city of Omaha, Nebraska, and that the said contract between the said plaintiffs and defendants was illegal and void." This was denied by the reply, but there was direct, positive testimony which established beyond question the fact that neither of the parties to this action had ever been licensed to sell malt, spirituous, or vinous liquors in the city of Omaha, as required by the laws of this state. It was also proven that the other averments of the answer above quoted were true. This case, therefore, falls within the rule laid down in *Wilde v. Wilde*, 37 Neb., 891, in principle, and upon a transaction of much the same character as that at bar it has practically been settled in advance by *Storz v. Finklestein*, 46 Neb., 577. The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

IOWA LOAN & TRUST COMPANY, APPELLEE, v. ALBERT A. WALKER ET AL., IMPEADED WITH J. C. STANDLEY, APPELLANT.

FILED FEBRUARY 16, 1897. No. 7044.

Review: DEFECTIVE RECORD. Questions of fact cannot be considered on appeal from a confirmation of a judicial sale where there is presented no proper evidence that the alleged facts ever existed.

APPEAL from the district court of Buffalo county. Heard below before HOLCOMB, J. *Affirmed*.

J. M. Easterling, J. J. Whittier, and M. O. Cornett, for appellant.

Fred A. Nye, contra.

RYAN, C.

There was a decree of foreclosure in favor of appellant in this case in the district court of Buffalo county, on April 30, 1892. Subsequently an order for the sale of the real property described in said decree was duly issued to the sheriff of the aforesaid county, by whom all of said land was duly advertised and at the proper time offered for sale in lots of 160 acres each. There was no bidder except for the northwest quarter of section 34, township 12, range 13, which was bidden on by appellant for more than two-thirds of the appraised value of this tract. On motion this sale was duly confirmed, and from such confirmation this appeal is prosecuted. The questions argued are as to the right of the judgment defendant to have all the land sold before resort to the above 160-acre tract, which he alleged was his homestead, and his right to have declared effective an alleged redemption before confirmation.

There is found in the transcript no answer to the original petition for a foreclosure; neither is there a bill of exceptions. The alleged homestead character of the property sold has not, therefore, been made to appear; neither is there presented any evidence of the payment into the district court of the amount necessary to redeem, as required by section 497a of the Code of Civil Procedure. The order of confirmation is therefore

AFFIRMED.

Clarke v. Nebraska Savings & Exchange Bank.

JOHN T. CLARKE ET AL. V. NEBRASKA SAVINGS &
EXCHANGE BANK.

FILED FEBRUARY 16, 1897. No. 7097.

Review: ASSIGNMENTS OF ERROR. In error proceedings no point will be considered which is not presented by the petition in error, even though argued in the brief of counsel.

ERROR from the district court of Douglas county.
Tried below before BLAIR, J. *Affirmed.*

James W. Carr, for plaintiffs in error.

Silas Cobb and Tiffany & Vinsonhaler, contra.

RYAN, C.

There was a judgment in this case in the district court of Douglas county against the maker and indorser of a promissory note. There is discussed in the brief of counsel but one question, and that is the right of the holder of a note to maintain suit upon it by virtue of a provision that the failure to pay within the time limited would cause the whole sum to become due at the election of the holder, it having been alleged in the answer that after the time limited for the payment of such interest there had been made a tender of such payment. This proposition was not suggested by the petition in error, hence it cannot be considered.

The only question presented upon the record is whether or not interest in excess of that provided by the note was allowed in the judgment. This assignment was not argued, and by computation we have not discovered any error in the respect indicated. The judgment of the district court is therefore

AFFIRMED.

JOSEPH S. WELLS V. HENRY STECKLEBERG.*

FILED FEBRUARY 16, 1897. No. 7113.

1. **Guardian and Ward: FAILURE OF GUARDIAN TO QUALIFY: VOID SALES.** One assuming to act as the guardian of the estate of a minor, who, in fact, has never qualified as such, has no standing to apply for authority to sell such minor's real estate, and an order made upon such application is an absolute nullity, as is also a sale thereunder, especially without service thereof as required by section 49, chapter 23, Compiled Statutes.
2. ———: ———: ———. The provisions of section 64, chapter 23, Compiled Statutes, apply to mere irregularities in respect to guardians' sales. They do not and cannot operate to confer jurisdiction otherwise entirely without existence.

ERROR from the district court of Stanton county. Tried below before NORRIS, J. *Reversed.*

The facts are stated in the opinion.

George G. Bowman, Albert & Reeder, and John A. Ehrhardt, for plaintiff in error:

The notice did not conform to the statutory requirement and amounted to no notice at all. The order of sale was therefore void. (*Mickel v. Hicks*, 19 Kan., 578; *Valle v. Fleming*, 19 Mo., 454; *Sibley v. Waffle*, 16 N. Y., 180; *Blodgett v. Hitt*, 29 Wis., 169; *Tunis v. Withrow*, 10 Ia., 305; *Newcomb v. Dewey*, 27 Ia., 381; *McAllister v. Moye*, 30 Miss., 258; *Lyon v. Vanatta*, 35 Ia., 521; *Spragins v. Taylor*, 48 Ala., 520; *Frazier v. Miles*, 10 Neb., 109; *Pardon v. Dwire*, 23 Ill., 572.)

John B. Wells never having been appointed guardian, the district court was without jurisdiction and its judgment, the sale, and other proceedings are void. (*Thatcher v. Powell*, 6 Wheat. [U. S.], 119; *Galpin v. Page*, 18 Wall. [U. S.], 350; *Morse v. Presby*, 25 N. H., 299; *Carleton v.*

*Rehearing allowed.

Washington Ins. Co., 35 N. H., 162; *Gunn v. Howell*, 27 Ala., 663; *Foster v. Glazener*, 27 Ala., 391; *Barry v. Patterson*, 3 Humph. [Tenn.], 313; *Cooper v. Sunderland*, 3 Ia., 114; *Wight v. Warner*, 1 Doug. [Mich.], 384; *Northcut v. Lemery*, 8 Ore., 317; *Ferguson v. Jones*, 20 Pac. Rep. [Ore.], 848; *Crawford v. Howard*, 30 Me., 422; *Walbridge v. Hall*, 3 Vt., 114; *Smith v. Rice*, 11 Mass., 513; *Henry v. Estes*, 127 Mass., 474; *Hall v. Howd*, 10 Conn., 514; *Gray v. McNeal*, 12 Ga., 424; *Rutherford v. Crawford*, 53 Ga., 138; *Horan v. Whar- enberger*, 9 Tex., 313; *State v. Metzger*, 26 Mo., 65; *Chandler v. Nash*, 5 Mich., 409; *Grier's Appeal*, 101 Pa. St., 412; *Maxsom v. Sawyer*, 12 O., 195; *Perry v. Brainard*, 11 O., 442; *Pryor v. Downey*, 50 Cal., 388; *Whitesides v. Barber*, 24 S. Car., 373.)

W. W. Young and Allen, Robinson & Reed, contra :

Jurisdiction attached when the guardian filed his petition for the sale of the property. (*Grignon v. Astor*, 2 How. [U. S.], 319; *Mohr v. Manierre*, 101 U. S., 417; *Beau- regard v. City of New Orleans*, 18 How. [U. S.], 502; *Com- stock v. Crawford*, 3 Wall. [U. S.], 396; *George v. Watson*, 19 Tex., 354; *McPherson v. Cunliff*, 11 S. & R. [Pa.], 422; *Alexander v. Maverick*, 18 Tex., 179; *Meyers v. McGavock*, 39 Neb., 843; *Morrow v. Weed*, 4 Ia., 77; *Davenport v. Schmidt*, 15 Ia., 213; *Frazier v. Steenrod*, 7 Ia., 339; *Meyer v. McDougal*, 47 Ill., 278; *Moore v. Neil*, 39 Ill., 256; *Morris v. Hogle*, 37 Ill., 150; *Hawkins v. Hawkins*, 28 Ind., 66; *Stow v. Kimball*, 28 Ill., 108; *Doe v. Anderson*, 5 Ind., 33.)

The court having jurisdiction, the purchaser is not bound to look beyond the decree; and his title is good. Irregularities in the proceedings would not invalidate the sale. (*Darrah v. Watson*, 36 Ia., 116; *De Tar v. Boone County*, 34 Ia., 490; *Cooper v. Sunderland*, 3 Ia., 133; *United States v. Arredondo*, 6 Pet. [U. S.], 729; *Elliott v. Piersol*, 1 Pet. [U. S.], 340; Compiled Statutes, ch. 23, sec. 64; *Thaw v. Ritchie*, 136 U. S., 548; *Thompson v. Tolmie*, 27 U. S., 157; *McNitt v. Turner*, 83 U. S., 352.)

RYAN, C.

This was an action of ejectment brought by Joseph S. Wells against Henry Steckleberg in the district court of Stanton county. The petition was in the ordinary form and was filed September 18, 1891. The answer was a general denial. Upon the trial of the issues to the court there was a judgment in favor of the defendant.

Joseph S. Wells inherited an interest in certain real estate of his mother at her death, in 1872. He was then two years of age. By partition proceedings in 1880, he was vested with the title to the property which is the subject-matter of this action. There was an application for the sale of this land by John B. Wells, in which the applicant described himself as the "Guardian of Joseph S. Wells duly appointed by the probate court in said Platte county." This application was granted, and by virtue of the authority thus conferred upon him, and no other, John B. Wells, at a public sale, sold said real property to Henry Steckleberg and afterwards, as guardian, accordingly executed a deed of the property, the sale meantime having been confirmed. On the trial of this action there was left, by the evidence, no room for doubt that John B. Wells had never been appointed guardian of his son, Joseph S. Wells. Indeed, his own testimony was that he assumed to act in making the sale and executing the deed, solely as the natural guardian of his son. Before he attained his majority, Joseph S. Wells notified Mr. Steckleberg that he repudiated the entire transaction by virtue of which Steckleberg now claims title, and he has since acted consistently with this his declared purpose, so that there is presented no element of estoppel in this case. It is quite clear, from an examination of section 6 of chapter 34 of the Compiled Statutes of 1883, that the father was the natural guardian of his minor child and was entitled to the care and custody of the minor's person. For him, or any one else, to dispose of the property of such minor it was, and still is, necessary

that he should be appointed by the probate court and qualify, as required by law, as guardian of the minor's estate. (Compiled Statutes, 1895, ch. 34.) An application to sell the property of a minor by one who did not claim to act as guardian would be an absolute nullity, and could confer no jurisdiction to make such sale or a conveyance thereunder, and, on principle, we cannot see that this is the less the case when the applicant falsely describes himself as guardian and thus perpetrates a fraud upon the court. • In this case there was no copy of the order of the sale served upon the next of kin of the minor as required by section 49, chapter 23, Compiled Statutes; indeed the order had been fraudulently procured by the very person upon whom, ordinarily, this order should have been served, and to whom the minor ought to be able, confidently, to look for the protection of his interests. There was a publication of the order required to be made in a newspaper, but that did not purport to dispense with the statutory service of the order above noted. There was, therefore, neither jurisdiction of the subject-matter nor of the person of the minor.

Notwithstanding the want of jurisdiction pointed out, it is insisted by the defendant that these matters are unavailable because of the provisions of section 64, chapter 23, Compiled Statutes, which are as follows:

"Sec. 64. In case of an action relating to any estate sold by a guardian, under the provisions of this subdivision, in which the ward or any person claiming under him shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings, provided it shall appear: First—That the guardian was licensed to make the sale by a district court of competent jurisdiction. Second—That he gave a bond, which was approved by the judge of the district court in case any bond was required by the court, upon granting the license. Third—That he took the oath prescribed in this subdivision. Fourth—That he gave notice of the time and place of the sale as prescribed by law. Fifth—

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That the premises were sold accordingly, at public auction, and are held by one who purchased in good faith."

The question involved is not one of mere irregularity. It is a question of jurisdiction, that is to say, of power to make any order of sale whatever; and hence, these provisions cannot be invoked. But even if by this section it had been attempted to declare the proceedings conclusively binding as to jurisdiction, no more power would have been assumed than was in section 130, chapter 77, article 1, Compiled Statutes, as to the conclusiveness of a tax deed, and yet this court has said that the creation of this conclusive presumption is not within the power of legislature. (*Larson v. Dickey*, 39 Neb., 463.) In view of the fact that the court was without jurisdiction to order the sale of the property of the minor, the deed executed by John B. Wells, as guardian, to Henry Steckleberg was a mere nullity. The judgment of the district court based upon this deed as evidence was therefore erroneous and, accordingly, it is reversed and this cause is remanded for further proceedings not inconsistent with the views above expressed.

REVERSED AND REMANDED.

POST, C. J., not sitting.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
v. PETER H. SODERBERG.

FILED FEBRUARY 16, 1897. No. 7104.

1. **Master and Servant: RISKS OF EMPLOYMENT.** A servant by his contract of employment assumes the ordinary risks and dangers incident thereto.
2. **Negligence: EVIDENCE.** To sustain a verdict for negligence it must have the support of competent positive evidence that the injury complained of was caused by the negligence of the defendant, or such negligence must be fairly and reasonably inferable from proved or conceded facts.

3. ———: ———. Evidence examined, and held not sufficient to sustain a finding of negligence.

ERROR from the district court of Kearney county.
Tried below before BEALL, J. *Reversed.*

The opinion contains a statement of the case.

J. W. Deweese, for plaintiff in error:

The requirement of the statute in reference to signals at public crossings imposes an obligation upon the company toward people who are crossing or are about to cross the railroad track on the public highway, and no one else can claim the enforcement of these signals. (*Bohan v. Milwaukee, L. S. & W. R. Co.*, 61 Wis., 394; *Spicer v. Chesapeake & O. R. Co.*, 12 S. E. Rep. [W. Va.], 553; *Christy v. Chesapeake & O. R. Co.*, 12 S. E. Rep. [W. Va.], 1111; *Rawlston v. East Tennessee, V. & G. R. Co.*, 20 S. E. Rep. [Ga.], 123; *East Tennessee, V. & G. R. Co. v. Smith*, 20 S. E. Rep. [Ga.], 127; *Landquist v. Duluth Street R. Co.*, 67 N. W. Rep. [Minn.], 1007.)

Plaintiff below assumed the risk and danger from passing trains. There was no evidence of any rule or custom requiring the foreman to warn trackmen of the approach of a train. The company is not chargeable with the alleged negligence of the foreman in failing to give warning of danger. The foreman and the men in the gang were fellow-servants. (*Jackson v. Missouri P. R. Co.*, 104 Mo., 456; *Thomas v. Missouri P. R. Co.*, 18 S. W. Rep. [Mo.], 980; *Shepard v. Boston & M. R. Co.*, 33 N. E. Rep. [Mass.], 508; *Cooney v. Great N. R. Co.*, 37 Pac. Rep. [Wash.], 440; *Sullivan v. Fitchburg R. Co.*, 36 N. E. Rep. [Mass.], 751; *Ell v. Northern P. R. Co.*, 48 N. W. Rep. [N. Dak.], 223; *Elliott v. Chicago, M. & St. P. R. Co.*, 150 U. S., 245; *Baltimore & O. R. Co. v. Baugh*, 54 Am. & Eng. R. Cas. [U. S.], 340; *Northern P. R. Co. v. Hambly*, 154 U. S., 356; *Northern P. R. Co. v. Charless*, 162 U. S., 359; *Northern P. R. Co. v. Peterson*, 162 U. S., 346; *Walker v. Kinnare*, 76 Fed. Rep., 101; *Railway Co. v. Leech*, 41 O. St., 389; *Ring v. Missouri P. R. Co.*,

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20 S. W. Rep. [Mo.], 436; *Jolly v. Detroit, L. & N. R. Co.*, 53 N. W. Rep. [Mich.], 526; *Olson v. St. Paul, M. & M. R. Co.*, 33 Am. & Eng. R. Cas. [Minn.], 386; *Nelling v. Chicago, St. P. & K. C. R. Co.*, 63 N. W. Rep. [Ia.], 568.)

W. S. Morlan and J. L. McPheeely, also for plaintiff in error.

Ed L. Adams, contra.

References: *Schlereth v. Missouri P. R. Co.*, 19 S. W. Rep. [Mo.], 1134; *Sioux City & P. R. Co. v. Smith*, 22 Neb., 775; *Chicago, B. & Q. R. Co. v. Sullivan*, 27 Neb., 673; *Chicago, St. P. & M. R. Co. v. Lundstrom*, 16 Neb., 258; *Little M. R. Co. v. Lewton*, 20 O. St., 401; *Lake Shore & M. S. R. Co. v. Lavelley*, 36 O. St., 221; *Burlington & M. R. R. Co. v. Crockett*, 19 Neb., 138; *Union P. R. Co. v. Billeter*, 28 Neb., 422; *Gulf Coast & S. F. R. Co. v. Wells*, 16 S. W. Rep. [Tex.], 1025; *Missouri P. R. Co. v. Williams*, 12 S. W. Rep. [Tex.], 835; *Louisville, N. A. & C. R. Co. v. Graham*, 24 N. E. Rep. [Ind.], 668; *Sherrin v. St. Joseph & S. L. R. Co.*, 15 S. W. Rep. [Mo.], 442; *Davis v. New York, N. H. & H. R. Co.*, 159 Mass., 532; *Texas & P. R. Co. v. Lewis*, 26 S. W. Rep. [Tex.], 873.

RYAN, C.

Plaintiff in error in this case seeks a reversal of a judgment in the sum of \$5,000 which was rendered by the district court of Kearney county upon the verdict of a jury. The defendant in error, whom we shall hereafter refer to as the plaintiff, because he was plaintiff in the district court, alleged, in substance, that on May 22, 1893, he was a section hand in the employ of the railroad company; that in the forenoon of that day, while the wind was blowing very hard and rain was falling, he, under the direction of a foreman, was working on the railroad at a point about fifty-seven rods east of a highway crossing, and that about twenty-three rods east of where he was at work there was a post, at which post the employes in

charge of trains of the railroad company were required to ring a bell and sound a whistle until the aforesaid highway should be reached; that the point where he was working was near the foot of a grade descending from the east; that trains coming down said grade usually made but little noise, other than by the escape of steam, which on said morning could not be heard. The negligence charged was the failure to sound the whistle and ring the bell as it was above indicated should have been done, and the failure of the foreman of the section gang to give notice of the approaching train before it struck the plaintiff.

The following facts appear without contradiction from the evidence adduced: The section gang, in the forenoon of May 22, 1893, was required by the unfinished condition of the work to surface up a portion of the track at a point about three and one-half miles east of Minden, the station nearest where the work was to be done. The day began with considerable wind, which grew stronger, and at about 9 o'clock, when the accident happened, was blowing very hard. There were occasional showers of rain, accompanied with sleet. The foreman was Henry Hamelius, and the gang was composed of five men, J. H. Showers, Albert Holstein, Oscar Holstein, Albert Thigh, and the plaintiff, Peter H. Soderberg. The whistling post was at the west end of a cut, and west of this post was a bridge, 540 feet distant. This post, as stated in the petition, was eighty rods east of a highway crossing. The foreman distributed his men along a high grade approaching this bridge, Soderberg being placed about ninety feet east of the bridge and directed to throw earth from the south side of the embankment upon the ties, and there so to dispose of it that the water would run each way from the center of the track. The two Holsteins were between twenty and thirty feet east of Soderberg, and Showers was ninety feet east of him on the north side of the track. No one described the position of Thigh. The foreman, after he had disposed of his men

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as above indicated, noticed that one side of the bridge seemed a little low, and thereupon he went under it to see if there was anything wrong. When he had finished his inspection the foreman came up on the track at the east end of the bridge, and looking eastward he saw, at a distance of about a quarter of a mile, a freight train approaching, and immediately called to his men notifying them of that fact. At this time Soderberg was on the embankment outside the south end of the ties, and was stooped over throwing earth upon the ties between the rails. Albert Holstein testified on behalf of plaintiff that, though fifteen feet away, he could not by calling to him three or four times make plaintiff aware of the approach of the train. Oscar Holstein, though he was within fifteen or twenty feet of his brother, Albert, was not able to understand what he was calling out. He saw that he was calling out something, and, looking in the direction he was pointing, discovered the approaching train. He further testified that it was a dreadful windy and stormy day. Peter Soderberg testified, but his testimony threw no light on the subject. The above was all the evidence given as to the surroundings and employment of Soderberg when struck by the train. It was a regular train and was on its schedule time. The foreman was not shown to be outside the line of his duty in making an inspection of what appeared to be a dangerous condition of the bridge. There was evidence that tended to show that this foreman had said to his men that in the yards and while moving over the track in a hand car he would look out for trains, and that the men need not trouble themselves to be also looking. There was no evidence that when his section men were surfacing the track the foreman, by reason of any promise, rule, or custom, was required to warn them of the approach of trains. They had the same means of knowing of this fact that he did. The track from where Soderberg was ran in a northeasterly direction, and a high wind was blowing from the north, so that, without doubt, he was

unaware of the impending danger, and, though no one testified just how it happened, it is doubtless true that in a stooped position he was standing close enough to the track to be struck by the engine when it reached him. He was, however, bound to know that trains were likely to be moving along this track, and there is undisputed evidence that if he had looked eastward he could have seen this train almost a half a mile distant. It was held by this court in *Dehning v. Detroit Bridge & Iron Works*, 46 Neb., 556, that it will be presumed that an employe contracts with reference to the risks ordinarily appertaining to his particular employment, and that he has notice of all the risks which are open and obvious, or ought to have been to a person of his experience and understanding. In *Missouri P. R. Co. v. Baxter*, 42 Neb., 793, this rule was stated in the first paragraph of the syllabus in this language: "A servant by his contract of employment assumes the ordinary risks and dangers incident thereto." The rule being as we have just stated, it was not a duty devolved upon the railroad company to require of its section foreman that he should exercise the only diligence necessary to prevent section men being struck by trains moving along the railroad undergoing repairs. These views are in accord with those expressed in *Ring v. Missouri P. R. Co.*, 20 S. W. Rep. [Mo.], 436, and *Nelling v. Chicago, St. P. & K. C. R. Co.*, 63 N. W. Rep. [Ia.], 568.

It is, however, insisted that it was shown that there was negligence in failing to ring the bell and sound the whistle for the crossing from the time the engine passed by the whistling post until it reached such highway crossing. The engineer testified in the most positive terms that the bell was arranged to ring automatically, and that on account of the high wind and the storm it was kept ringing from the time the engine left Hastings until it reached Minden. He also testified that he sounded the whistle from the time he left the whistling post until he reached the highway crossing. The fireman testified that he was so accustomed to the sound of the bell and whistle

that he did not notice either. The foreman's testimony was that if there had been no wind or storm he could have heard the whistle and bell, but with both wind and storm prevailing as it did, he did not know whether he could have heard them or not. As it was, he did not hear the bell or whistle. The effect of the testimony of the other witnesses was that they did not hear the bell or whistle, but whether they could have heard the sound if either had been used, notwithstanding the wind and the storm, they did not undertake, nor were they required, to state. The burden of showing negligence rested upon the plaintiff. (*Spears v. Chicago, B. & Q. R. Co.*, 43 Neb., 720.) As was said in *Kilpatrick v. Richardson*, 40 Neb., 478: "For that verdict to stand it must have for support competent, positive evidence that the injury was caused through the negligence of the plaintiffs in error, or such negligence must be fairly and reasonably inferable from proved or conceded facts in evidence." (See, also, *Kearney Canal & Water Supply Co. v. Akeyson*, 45 Neb., 636.) The evidence as to the failure to ring the bell or sound the whistle was scarcely strong enough to raise a mere conjecture, most certainly it could do no more. The plaintiff was outside the rails, and even beyond the ties, and there is no claim that the engineer failed or neglected to do his duty upon seeing plaintiff in a dangerous place; indeed, no one seems to have known beforehand that plaintiff was in dangerous proximity to the track, or even how it happened that he was struck, more definitely than that before the engine reached him he was outside the track, and by the time it reached him he was close enough to the track to come in contact with some part of the locomotive. He may have been that near the track for some little time, or he may have moved nearer just before he was struck; no one could describe how it was. We are of the opinion that there was not sufficient evidence to justify a finding that any employe of the railroad company was guilty of negligence, and the judgment of the district court is therefore reversed and the case is re-

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manded for further proceeding consistent with the views above expressed.

REVERSED AND REMANDED.

THOMAS M. ROBERTS V. JESSIE M. HOPPER ET AL.

FILED FEBRUARY 16, 1897. No. 7092.

Assignments of Error: EVIDENCE OF DAMAGE. Under an assignment of error that the damages awarded by the jury are excessive, this court will not review the action of the trial court in admitting in evidence items of damage.

ERROR from the district court of Burt county. Tried below before AMBROSE, J. *Affirmed.*

H. E. Carter, for plaintiff in error.

H. Wade Gillis, *contra.*

RAGAN, C.

Jessie M. Hopper brought this suit in the district court of Burt county in behalf of herself and two minor children against Thomas M. Roberts, a licensed dealer in intoxicating liquors, to recover damages for loss of support to herself and children by reason of the drunkenness of her husband caused by intoxicating liquors sold to him by Roberts. She had a verdict and judgment and Roberts brings the case here for review.

The only argument made in the brief is that the damages awarded by the jury are excessive. The verdict was for a much smaller sum than that claimed by the plaintiff below in her petition and not in excess of the amount warranted by the evidence. Under an assignment that the damages awarded are excessive we cannot review the action of the district court in admitting in evidence certain items of damage. Our consideration of the case

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must be confined solely to the assignment of error argued in the brief. The judgment of the district court is

AFFIRMED.

JACKSON BRADLEY V. A. B. SLATER.

FILED FEBRUARY 16, 1897. No. 7101.

1. **Landlord and Tenant: CONTINUATION OF TENANCY.** When a tenant with the consent of his landlord, express or implied, holds over his term, the law presumes a continuation of the original tenancy for another like term and upon the same conditions.
2. ———: ———: **EVIDENCE.** But this presumption is not a conclusive one, and may be overthrown by evidence that the tenant's holding over was in pursuance of an agreement with his landlord that he might so hold over and pay rent only for the time he occupied.
3. ———: ———: ———. In a suit against a tenant who had held over two months, to recover rent for a term equal to the prior one and at the same rent, the evidence disclosed that before the expiration of his term the tenant notified his landlord that he would not occupy the leased premises after the expiration of his term; that he had purchased other premises, into which he intended removing, but that they would not be ready for occupancy when his lease expired; that the tenant held over without any express agreement with his landlord that he might do so, but with his knowledge and without his protest. *Held*, That this evidence was not sufficient to overthrow the legal presumption that the tenant was in for another term of the same length as the prior one and on the same conditions.
4. ———: ———: ———. When the lease of a tenant expires by its terms and he does not vacate, the landlord may, at his option, treat him as a trespasser or as a tenant; and if he continues to occupy without protest or objection from his landlord, the law, by the presumption, supplies the *prima facie* evidence, binding upon both landlord and tenant, that such a relation exists between them, and that the tenant is in for the same length of term and on the same conditions as his first term.

ERROR from the district court of Douglas county.
Tried below before OGDEN, J. *Reversed*.

Warren Switzler, for plaintiff in error.

Joseph R. Clarkson, *contra*.

RAGAN, C.

Premises were demised by written lease for one year in consideration of a stated rent. The tenant held over his term two months. The landlord then sued to recover rent for the premises for one year after the expiration of the first term upon the theory that the tenant, by holding over, became liable for the rent of the leased premises for a year at the same rent fixed in the first lease. The tenant had a verdict and judgment and the landlord prosecutes error.

The defense of the tenant, so far as material here, was that he held over in pursuance of an agreement with the landlord that he might do so, paying rent for the time he occupied at the same rate per month as he paid under the first lease. The evidence shows that in November, 1889, one Jacob R. Hendrix owned the premises and on said date demised it by a written lease to Augustus B. Slater for one year, or until the 15th of November, 1890, in consideration of a rent of \$750 paid and agreed to be paid by Slater; that after taking possession of the leased premises Slater purchased a lot in the city of Omaha, where the leased premises were situate, and began the erection thereon of a dwelling. Before the lease expired Slater notified Hendrix that he had purchased a lot and was building a house but that it would not be ready for occupancy until about January, 1891; that he intended to move into it as soon as it was ready for occupancy, and that he would not renew the lease or remain in possession of the leased premises for another year. Hendrix endeavored to release the premises to Slater for another year, but this was refused by the latter. Hendrix then sought to release the premises to Slater for six months after the expiration of his lease, but this was declined by Slater. The record contains no evidence that Hendrix expressly agreed that Slater might hold over on any terms whatever; nor does it show that he protested or objected to Slater holding over the time he did. Slater

paid the rent in full for the premises for the year ending November 15, 1890. About the 13th of January, 1891, Slater abandoned the leased premises and at that time returned the keys of the building to Hendrix and paid him \$125, being two months' rent of the premises at \$62.50 per month. Hendrix, when he accepted the keys and the rent, notified Slater that he did so under protest and that he would make reasonable efforts to find a tenant for the premises for the year ending November 15, 1891, and that if he did not receive as much rent for them as Slater paid for the year ending November 15, 1890, he would look to Slater to make up the difference. On the 14th or 15th of January, 1891, Hendrix sold and conveyed the premises by warranty deed to plaintiff in error Bradley, who brought this suit. It is quite clear that the evidence does not sustain the defense interposed to this action by Slater, namely, that he held over in pursuance of an express contract with his landlord. When a tenant, with the consent of the landlord, express or implied, holds over his term, the law presumes a continuation of the original tenancy upon the same terms and conditions. (See the rule stated and the authorities collated in 12 Am. & Eng. Ency. of Law, p. 758*q*. See, also, *Yates v. Kinney*, 19 Neb., 275, and *Schuyler v. Smith*, 51 N. Y., 309.) The last case cited was strikingly like the one at bar. In that case the premises were leased for one year, and before the expiration of the lease the tenant notified the landlord that they would not occupy the premises after their term expired; that they had hired other premises to which they intended removing on the expiration of their lease. The tenants, nevertheless, held over twenty-one days. The landlord then sued them for a year's rent of the premises at the same rate fixed by the lease of the previous year. The court said: "The plaintiff claims that because the defendants held over and continued in the occupancy of the premises for three weeks after the expiration of the lease he had the right to hold them as tenants for the whole year. This they deny, because they

gave him notice before the expiration of the term that they did not intend to occupy the premises for another year and made arrangements, with his knowledge, to occupy another wharf. I am of opinion that the plaintiff's claim is well founded. The law is too well settled to be disputed that where a tenant holds over after the expiration of his term the law will imply an agreement to hold for a year upon the terms of the prior lease. * * * But the defendants claim that this implication of law may be rebutted and that the tenants may show by proof that they did not intend to hold upon the same terms as the prior lease, and they claim that the notice which they gave in this case was sufficient to overthrow this implication. * * * In this case the defendants hold over wrongfully. It cannot be disputed that they were trespassers; and their notice did not deprive their act of holding over of its tortious character. The law should not give them the option to determine whether they should be treated as trespassers or as tenants. This option should be accorded to the innocent holder of the property. The law regards the possession of real estate as a great advantage in any dispute in reference to it, and hence a tenant who has obtained possession of real estate cannot dispute the title of his landlord; and having obtained possession from his landlord he should not be permitted to hold over, deny his tenancy, and convert himself into a wrong-doer." Applying these authorities to the facts of the case at bar, it follows that Slater being a tenant for a year and having held over after the expiration of his term without an agreement with his landlord, but with his assent, the presumption is that he held the premises for another year upon the same terms that he held them the first year. But this was a presumption only, and it was perfectly competent for Slater to show in this case that his holding over was in pursuance of an agreement with his landlord that he might hold over, might pay rent for the time which he did hold over, and for that time only. The evidence introduced by Slater was not suffi-

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cient to overthrow the presumption that he was holding for another year on the same terms that he held the first year. The evidence, and all the evidence, introduced by Slater to sustain his defense of holding over under an express agreement was that he had notified his landlord before the expiration of the term that he would not occupy the premises for a second term, and that he held over, if not with the consent, at least without any protest from his landlord and with his knowledge. This was not sufficient evidence to justify a finding that the tenant held over in pursuance of an express agreement with his landlord that he should pay rent only for the time which he held over; nor was it sufficient to overthrow the presumption of law that his holding over was for a year and on the terms and conditions of his first lease, and the legal presumption remained in force and controlled the case. When the lease of a tenant expires by its terms and the tenant does not vacate, the landlord may, at his option, treat him as a trespasser or as a tenant; and if the tenant continues to hold over without protest or objection from his landlord and without demand for the possession of the premises, the law raises the presumption, binding upon both landlord and tenant, that the relation of landlord and tenant exists between the parties and that the latter is in for the same length of term and on the same conditions as the first term; but this is a presumption only and may be overthrown by proof that the tenant is holding over in pursuance of an agreement to pay rent for the premises for the time which he holds over. (*Montgomery v. Willis*, 45 Neb., 434.) The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Berger v. Lincoln County. Clarke Drug Co. v. Boardman.

JOHN J. BERGER ET AL., APPELLANTS, V. LINCOLN COUNTY
ET AL., APPELLEES.

FILED FEBRUARY 16, 1897. No. 7125.

Review: UNAUTHENTICATED BILL OF EXCEPTIONS: AFFIRMANCE.

Where, in a case brought to this court on appeal, the bill of exceptions is uncertified by the clerk, and the pleadings support the decree rendered, it will be affirmed.

APPEAL from the district court of Lincoln county.
Heard below before NEVILLE, J. *Affirmed.*

J. S. Hoagland, for appellants.

J. G. Beeler and *H. D. Rhea*, *contra.*

RAGAN, C.

This is an appeal in equity from the district court of Lincoln county. We cannot review the evidence, because the bill of exceptions is not certified by the clerk to be either the original bill or a certified copy thereof. The pleadings support the decree rendered, and it is accordingly

AFFIRMED.

CLARKE DRUG COMPANY ET AL., APPELLANTS, V. GEORGE
M. BOARDMAN ET AL., APPELLEES.

FILED FEBRUARY 16, 1897. No. 7084.

1. **Insolvency: PREFERRING CREDITORS.** A creditor may take such lawful steps as he deems best to secure the payment of a debt owing to him; and if the creditor's only motive be the honest one of securing his debt, he will not be guilty of fraud because the effect of securing or paying his debt is to leave some other creditor's debt partly or wholly unpaid.
2. ———: ———: **RELATIVES: CONFESSION OF JUDGMENT: CREDITORS' BILL.** For the purpose of enabling him to buy a drug store and

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engage in business, a mother loaned her son, who had no property, \$1,500. For this loan he gave her his note due in one year. He purchased the store for \$2,000, paid thereon the cash borrowed of his mother, and gave his note for \$500 for the balance. While he was in business he represented to wholesale dealers that his only indebtedness was the \$500 owing on the purchase of the store, and concealed the fact of his indebtedness to his mother. The wholesale dealers sold the son goods and extended him credit, ignorant of the fact that he was indebted to his mother and relying upon his statement that his total indebtedness was the \$500. After the mother's note matured she ascertained that her son was financially embarrassed; induced him to confess a judgment in her favor for the amount due her on her note; and caused the drug store to be seized and sold on execution. Thereupon the wholesale dealers sought, by a suit in equity, to have their judgments against the son paid out of the proceeds of such sale before the payment of the mother's judgment. *Held*, (1) Whether the money furnished to the son by the mother was a loan, a gift, or an advancement, whether or not the mother was actuated by a sinister motive in furnishing the money to her son at the time and under the circumstances that she did, in doing nothing to notify the public of such fact, in inducing her son to prefer her to his other creditors at a time when he was financially embarrassed and in resorting to the confession of judgment for that purpose, were, one and all, questions of fact; (2) that the evidence would not support any other finding than the one made by the district court, that the money furnished by the mother was a loan, and that her entire conduct in the premises was inspired by an honest purpose and that in nothing that she did was she influenced by a motive to defraud any one.

3. ———: ———: ———: ESTOPPEL: PROCEEDS OF EXECUTION. *Held*,

That the mother was not estopped from claiming the proceeds of the execution sale as against her son's other creditors because he had no property when she made him the loan; nor because to her knowledge the son borrowed the money to purchase the drug store; nor because to her knowledge the son embarked and continued in business, his only capital being the money she had loaned him; nor because she did not give any notice of the fact that the capital on which her son was doing business was loaned to him by her, and unpaid; nor because she did not take and file a chattel mortgage on the drug store to secure the loan when it was made; nor because the son concealed from the wholesale dealers the fact that he was indebted to his mother and thereby induced them to extend him credit; nor because the effect of the son's preferring her debt was to leave the debts of his other creditors partly or wholly unpaid; nor because she resorted to a confession of judgment to secure such preference and expedite its payment.

4. ———: ———: ———: BURDEN OF PROOF. An insolvent son may

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prefer his mother to his other creditors by securing or paying her debt; but when such preference is called in question by the other creditors the law places the burden on the mother of showing by a preponderance of the evidence that such preference was accepted by her in good faith for her protection, and not for the purpose of defrauding any one.

APPEAL from the district court of Hamilton county.
Heard below before WHEELER, J. *Affirmed.*

A. W. Agee, Howard M. Kellogg, and Whitmore & Carr, for appellants.

Cases cited by counsel for appellants are referred to in the opinion.

Hainer & Smith and Howell & Spear, contra.

RAGAN, C.

In the district court of Hamilton county George M. Boardman confessed a judgment in favor of his mother, Mary T. Boardman, on a promissory note. An execution was issued upon this judgment and levied upon a stock of drugs belonging to George M. Boardman, the stock sold, and thereupon a number of his other creditors, who had obtained judgments against him and whose executions had been returned "No property found," brought this action to enjoin the sheriff from paying the proceeds of the sale of said stock of goods to George M. Boardman's mother. The trial resulted in a decree dismissing the action of the creditors, and they have appealed.

1. Briefly, the facts are as follows: In June, 1891, Frank Chambers owned a drug store and stock of drugs at Hampton, Nebraska. At that time Mary T. Boardman and her husband resided at Albion, Nebraska, and she had considerable property of her own. Her son, George M. Boardman, was then a married man and had been for some years employed as a drug clerk, but was without any property, and desired to embark in the drug

business. Chambers advertised his Hampton store for sale. This advertisement was seen by George M. Boardman, and he and his father then went to Hampton and looked over the drug stock of Chambers. Negotiations followed which resulted in Chambers selling his drug stock to George M. Boardman for \$2,000. Fifteen hundred dollars of this money was loaned to George M. Boardman by his mother, and for this he executed a promissory note, due in one year. The remainder of the purchase price of the stock was evidenced by some promissory notes executed by Boardman to Chambers. George M. Boardman continued the operation of the drug store for about a year, during which time he became indebted to several wholesale houses, hereinafter called "commercial creditors." While he was in business he made certain statements to commercial agencies that his only indebtedness was the \$500 owing to Chambers as the balance of the purchase price of the drug stock, and concealed the fact that he was indebted to his mother. After George M. Boardman had been in business about a year, and after the note given to his mother had matured, his mother ascertained that he had been using intoxicants to excess, and that his financial affairs were in an embarrassed condition; and at her request he confessed a judgment in her favor upon the note which he had given her for the money borrowed. It also appears from the evidence that the commercial creditors, relying upon the statements made by George M. Boardman to the commercial agencies that his only indebtedness was that of \$500 to Chambers, sold him goods and extended him credit. It does not appear that the commercial creditors, or any of them, knew that George M. Boardman was indebted to his mother, nor does it appear that Mrs. Boardman knew until the trial of this case that her son had represented his only indebtedness to be the \$500 owing Chambers, and had concealed from the commercial creditors the fact of his indebtedness to her.

The commercial creditors seek to restrain the sheriff

from paying to Mrs. Boardman the proceeds of the execution sale of the drug store upon two grounds, as we gather from the petition filed by them in the court below. The first of these is that the entire transaction between Mrs. Boardman and her son was fraudulent; that it was a scheme devised to delay and defraud them; and second, that by reason of the facts already stated Mrs. Boardman is estopped as against them to claim the proceeds of the sale of the drug stock. The district court has found that there was no fraud on the part of either Mrs. Boardman or her son in any of the transactions between them, and this is the only finding on that issue that the evidence would support. Some attempt was made at the trial to show that the \$1,500 furnished by Mrs. Boardman to her son was in the nature of an advancement to him, but this attempt was a failure. The evidence leaves no room for doubt that it was an ordinary loan.

It seems also to have been insisted in the trial court that the confession of the judgment by young Boardman in favor of his mother was fraudulent, as its effect was to enable him to prefer his mother as a creditor. It may be true that young Boardman desired to prefer his mother, and it may be true that she desired to be preferred; and it is probably true that she realized that by her inducing her son to confess a judgment in her favor she would be more likely to secure the payment of her debt; but if she knew these facts, and if her knowledge of the embarrassed financial circumstances of her son prompted her to induce him to confess a judgment in her favor, still all this would not be conclusive evidence of a fraudulent intent on her part. A debtor has the right to prefer one creditor to another if the preference is made and accepted in good faith. And while the evidence shows that young Boardman was willing to prefer his mother, and she was anxious to secure the payment of her debt, and took the step she did for that purpose, still the evidence would not warrant the conclusion that she

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accepted this confession of judgment for the purpose of hindering, delaying, or defrauding the other creditors of her son. It is not a fraud, nor evidence of fraud, for a creditor to be vigilant in the collection or securing of a debt due to him from a debtor. A creditor may take such lawful steps as he deems best to secure the payment of a debt due him from a debtor, though the latter be in failing circumstances and largely indebted to others; and if his motive be the honest one of securing his own debt, he will not be guilty of fraud because the effect of securing or paying his debt is to leave some other creditor's debt partly or wholly unpaid. No rule of law or equity forbids a creditor to exercise diligence for his own protection. If the motive which prompts his conduct in collecting or securing the debt is the honest one of self-preservation the law will protect him, no matter what may be the effect on other creditors. So long as his conduct is not prompted by a sinister motive to hinder, delay, or defraud other creditors, he is entitled to all the advantage which his diligence, knowledge, and vigilance give him; and since in the case at bar the confession of judgment was brought about without any intention upon the part of Mrs. Boardman to hinder, delay, or defraud the other creditors of her son, they cannot be heard to charge fraud because the effect of the confession of judgment was to give Mrs. Boardman a first lien upon the property of their common debtor.

2. It is insisted by the commercial creditors that because Mrs. Boardman loaned to her son the capital which he invested in the drug business, she thereby enabled him to hold himself out to the world as the owner of the drug stock, and to contract debts on the strength of his being the owner thereof; and that, therefore, she is estopped from now claiming the proceeds of the execution sale. If this contention be correct, it must be because Mrs. Boardman has done, or omitted to do, something which she was under a legal or equitable obligation to do or omit to do, and that by reason of her conduct the com-

mercial creditors have changed their status, to their injury. What has she done? She loaned her son the capital which he invested in business, and when his debt to her matured she took steps to secure its payment. Certainly she violated no rule of morals or law in doing either of these things if the motives which prompted her to these actions were honest, and if she was innocent,—and we have seen that she was,—of any intention to defraud these commercial creditors. What has she omitted to do? She did not advise the world that she had loaned her son money to buy this drug stock; nor was she under any legal or moral obligation to do so. She did not take a mortgage upon this stock and file it, and thus give notice to the world of her claim; nor was it her duty so to do. No mortgage was offered her and she requested none. She kept silent in regard to the debt which her son owed her, but under circumstances when it was not her duty to speak; and her silence was not a concealment of her claim against her son, either for the purpose of assisting him or injuring others. When her debt matured she did not notify her son's other creditors that she was about to take steps to secure its payment, and we know of no rule of law or morals that made it her duty to give such notice. It is true that the commercial creditors furnished the son goods and extended credit to him, believing his only indebtedness to be the \$500 that he owed Chambers, and by so doing they have changed their status to their injury. But the proximate cause of their action and their injury was not the loan made by Mrs. Boardman to her son, but the false statements made by the son to them. Mrs. Boardman at no time had any interest in or control over this stock of drugs. The son was not her agent. He was her debtor, and she is not bound or estopped by any representation that he made, as she neither induced him to make such statements nor knew they had been made. Suppose that wholesale dealer A had sold young Boardman \$5,000 worth of goods on credit and he had put them into his stock, and while

these goods were on hand another wholesale dealer, B, had inquired of young Boardman if he owned these goods and if he was in debt, and he had replied that he owned the goods and that they were paid for, and upon the strength of that representation B had sold more goods to young Boardman and extended him credit therefor. Is there any rule of law or equity that would postpone A's debt to B's? And yet the principle which controls the point under consideration is precisely the principle that would control a contest between A and B if B were claiming that by reason of A's conduct his claim against young Boardman should be postponed.

Counsel for the appellants, to sustain their contention that Mrs. Boardman is estopped as against these commercial creditors to claim the fund in question, have cited us to several authorities, which we will now briefly review.

The first case cited is *Webb v. Armistead*, 26 Fed. Rep., 70. In that case Armistead's relatives loaned him the capital with which he embarked in business. He afterwards failed and made an assignment for the benefit of his creditors, preferring his relatives who had loaned him the money with which he started in business, and the court held that the deed of assignment was void on its face because of the extraordinary powers and discretion which it conferred upon the assignee named therein. Counsel for the appellants here insist that the court also decided that the preference given to his relatives by Armistead was void as against his commercial creditors, because this preference was in fact the only capital which Armistead put into his business. We do not think the decision of the case turned upon that point, and if it did, we are not prepared to follow it. In that case, as in the case at bar, it was shown that the debtor had made statements to the commercial agencies as to his indebtedness and concealed the fact that he was indebted to his relatives; that the commercial creditors relied upon these statements and sold him goods and extended him credit upon the faith of them. But there is in the case no refer-

ence whatever to the fact that the commercial creditors changed their status, not by reason of the fact that Armistead's relatives had loaned him capital, but because they relied upon his false statements.

Smith v. Sipperly, 34 Pac. Rep. [Utah], 54, is another case cited by counsel for appellants. But this case follows the holding of the federal court in the *Armistead Case*, and adopts its opinion without discussion or examination.

Another case cited is *Krippendorf v. Hyde*, 28 Fed. Rep., 788. The court said: "If a creditor of a commercial firm whose insolvency is known to him, but not to the public, helps the firm to keep going and to extend largely the scope of its business and credit, under a promise of preference over other creditors in case of disaster, which under the circumstances is clearly probable, and the firm, having obtained large quantities of goods on credit, turns them over to this creditor in payment of his demands, keeping nothing for other creditors, the transfer of the goods will be deemed fraudulent." The opinion in the case was written by Woods, J., and the preference seems to have been held fraudulent because of a secret promise therefor made by the commercial firm at the time the creditor loaned it money. The case is not in point here and the learned judge cites no authority to support the conclusion reached by him; and in addition to this the same judge, in *Smith v. Craft*, 17 Fed Rep., 705, in an able opinion in which the authorities are examined, held that a preference given by a failing debtor in pursuance of a promise made when he obtained the loan, to make such a preference in case of his failure would not be set aside as fraudulent at the instance of other creditors unless a fraud was intended. And again in *Lippincott v. Shaw Carriage Co.*, 25 Fed. Rep., 590, the same judge made the same ruling that he did in *Smith v. Craft*, *supra*. In view of these contradictory decisions of the *nisi prius* federal courts, we do not feel bound to follow the rule announced in the *Armistead Case*.

Another case cited by counsel for appellants is *White v. Heimerdinger*, 17 N. Y. Supp., 888. In that case a mother gave to her son a letter addressed "To Whom It Might Concern," stating that she had loaned him \$10,000, "to be paid back at his option, and leave same to him at the risk of his business for five years." This letter was shown to commercial agencies and through them to a commercial creditor, who sold the son a large amount of goods on credit on the faith of this letter. In less than a year after the date of the letter the son became insolvent, and confessed judgment in his mother's favor for the amount of the loan made by her to him; and the court held,—and correctly, we think,—that the commercial creditor's claim took precedence of the mother's; but that case is not in point here. As said by Lawrence, J., in the opinion, it is perfectly clear that it was the mother's intention to lead commercial creditors who might see and rely upon her letter to believe that the \$10,000 which she had loaned to her son was to be at the risk of the business, and subject to all its hazards. The very object that the mother had in writing the letter was to give notice to the world that the \$10,000 which she had loaned her son to invest in business was, for at least a period of five years, to be considered and regarded by persons dealing with him as his.

Another case cited by appellants is *Roy v. McPherson*, 11 Neb., 197. In that case Mrs. Roy put into the hands of her brother a sum of money with which to purchase land for her. The brother purchased the land, but took the title in the name of Mrs. Roy's husband. This was in 1864. Mrs. Roy knew that the title to the land had been placed in her husband's name at the time it was done. She acquiesced in this for thirteen years. During this time her husband engaged in mercantile business and contracted debts upon the faith of his being the owner of this land. The husband failed and a contest arose between his creditors and Mrs. Roy as to the title to this land, and we held that Mrs. Roy had estopped herself to

claim this land as against her husband's creditors. But that case is not an authority for the contention under consideration. Mrs. Roy owned the equitable title to this land. Her husband held it in trust for her and she kept the trust a secret. It was her duty to speak and she kept silent, and her silence caused her husband's creditors to change their status to their injury, and she was rightly held estopped as against them from claiming the land. But Mrs. Boardman did not own the drug stock or any interest in it. Her son did not hold this drug stock in trust for her. She is not here claiming to be the owner of this drug stock or any interest in it. Her attitude here is that of a creditor. She did not keep silent at any time when it was her duty to speak, and no creditor of her son was induced to change his status because of Mrs. Boardman's silence.

Other cases cited by appellants are *Early v. Wilson*, 31 Neb., 458, and *Swartz v. McClelland*, 31 Neb., 646. These cases follow the rule announced in *Roy v. McPherson*, and, for reasons already stated, are not in point here.

The transactions out of which this suit grew occurred between parent and child, and if the decree of the district court shall be affirmed its result will probably be to deprive the other creditors of young Boardman of their debts; and because of these facts, the law has placed on this mother the burden of showing by a preponderance of the evidence that her conduct in the premises and the motives which inspired it were honest; that the entire transaction was in good faith, and that in nothing that she did was there any intention to defraud the son's other creditors. (*Plummer v. Rummel*, 26 Neb., 142; *Ward v. Parlin*, 30 Neb., 376; *Perego v. Krantz*, 31 Neb., 58; *Carson v. Stevens*, 40 Neb., 112; *Melick v. Varney*, 41 Neb., 105; *Glass v. Zutavern*, 43 Neb., 334; *Steinkraus v. Korth*, 44 Neb., 777.) But this is merely a rule of evidence and owes its origin to the fact that the relationship existing between members of the same family is not only an inducement for them to protect one another, but affords

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opportunities for the perpetration of frauds. But business transactions between relatives are not forbidden by law, and, subject to the rule of evidence just stated, such transactions between them are governed, and the rights and liabilities of the parties thereto are determined, in the same manner as if they were strangers; and the preference made by young Boardman to his mother was neither fraudulent, illegal, nor inequitable, because of the fact that the loan represented by the preference was the only capital with which young Boardman embarked in business. (*Laird v. Davidson*, 25 N. E. Rep. [Ind.], 7; *Hegele v. First Nat. Bank of Peru*, 21 N. E. Rep. [Ill.], 812; *Buhl v. Peck*, 37 N. W. Rep. [Mich.], 876; *Tomlinson v. Matthews*, 98 Ill., 178; *City Bank v. Wright*, 26 N. W. Rep. [Ia.], 35.) Mrs. Boardman has shown beyond all question that her conduct in lending her son money to embark in business and inducing him to confess a judgment in her favor was actuated with honest motives and free from any sinister purpose to defraud her son's other creditors; that she has done nothing nor omitted to do anything which caused his creditors to change their status, and she is therefore entitled to have the amount of her judgment paid in full from the proceeds of the execution sale. The decree of the district court is accordingly

AFFIRMED.

FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD
COMPANY V. CHARLES HARLIN.

FILED FEBRUARY 16, 1897. No. 7108.

1. **Railroad Companies: NEGLIGENCE IN CONSTRUCTING DITCHES:**
PLEADING. A plaintiff alleged in his petition that the defendant, a railroad company, carelessly and negligently constructed its ditches along its track through the lands of plaintiff, in such a manner as to cause the surface waters to collect in said ditches and be precipitated on plaintiff's land, whereby certain of his crops were destroyed, certain of his trees growing on said land

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were destroyed, and his land was depreciated in value by the deposit thereon of clay and sand. *Held*, (1) That because of the general allegation of the railroad company's negligence in constructing its ditches, the petition was open to a motion to make more definite and certain; (2) but that the general allegation of negligence was good as against a demurrer, and, therefore, the petition stated a cause of action.

2. **Eminent Domain: CONVEYANCE TO RAILROAD COMPANY: RELEASE OF DAMAGES: CONSTRUCTION OF DITCHES: NEGLIGENCE: MEASURE OF DAMAGES.** A land owner conveyed to a railroad company a right of way across his land. The conveyance contained the following release: "For the consideration aforesaid do hereby release and discharge the said party of the second part, its successors and assigns, from all costs and damages which the said party of the first part has now sustained, or shall at any time hereafter sustain, in any way by reason of the construction, building, or use of the said railroad." The railroad company afterwards built its road on the right of way purchased, and in so doing constructed thereon certain ditches for the purpose of draining its road-bed. Subsequently the land owner conveyed his land to the defendant in error and he sued the railroad company for damages, alleging that said ditches were negligently constructed, and by reason thereof they conducted the surface waters collected therein on his land, destroyed certain of his crops, certain of his trees, and injured his land by depositing sand and clay thereon. The railroad company pleaded the release in the right of way deed in bar of the action. *Held*, (1) That if the release would estop the original owner had he retained the land and brought this action, it would likewise estop the defendant in error; (2) that the true construction of the release is that by it the land owner acknowledged satisfaction for the value of all the land appropriated by the railroad company for its right of way, and released and discharged it from all damages which the remainder of his land had sustained, or would sustain, by reason of the non-negligent construction, maintenance, and operation of its road across the lands for all time; (3) that the release should be given the same effect as if it were a judgment rendered in a condemnation proceeding instituted by the railroad company for right of way over the land; (4) that in such a judgment, and therefore in the release, were not included damages for injuries that might afterwards arise as the results of a negligent construction, maintenance, or operation of the road; (5) that it was not within the contemplation of the parties to the right of way deed, at the time it was executed, that the railroad company would negligently construct, maintain, or operate its road; (6) that had the right of way been obtained by condemnation the land owner in that proceeding could not have been awarded damages upon the theory that he might in the future sustain injury by reason of the railroad company's negligently constructing, maintaining, or operating

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its road; (7) that the defendant in error's cause of action arose when the injury sued for occurred, and not when the ditches were completed; (8) that whether the ditches were properly and skillfully constructed for railroad purposes was not the material issue in the case; (9) and if so constructed, that of itself did not afford the railroad company a complete defense to the action, as the material issue in the case was whether the railroad company had so constructed its ditches as to unnecessarily and negligently injure the defendant in error; (10) that the measure of the defendant in error's damages was the value of his crops destroyed, the value of his trees destroyed, and the difference in the value of his land immediately before and after the depositing of the sand and clay thereon.

- 3. Railroad Companies: DRAINAGE: NEGLIGENCE: DAMAGES: INSTRUCTIONS.** In addition to a general denial that the defendant in error had sustained any damages and that it had been guilty of any negligence in constructing its ditches the railroad company interposed the defense that the damages claimed resulted from a rain storm so unprecedented as to amount to the act of God. The district court instructed the jury that if the railroad company had failed to establish by a preponderance of evidence the defense interposed they should find for the defendant in error. *Held*, That the giving of the instruction was reversible error.

ERROR from the district court of Saunders county.
Tried below before BATES, J. *Reversed*.

See opinion for references to cases.

William B. Sterling and J. E. Frick, for plaintiff in error.

C. Hollenbeck, *contra*.

RAGAN, C.

Charles Harlin brought this suit in the district court of Saunders county against the Fremont, Elkhorn & Missouri Valley Railroad Company, hereinafter called the railroad company, to recover damages which he alleged he had sustained by reason of the destruction of certain of his crops, certain trees growing upon his land, and by reason of the deposit on his land of quantities of debris, all caused by the negligence of said railroad company in constructing certain ditches on its right of way in such a manner as to cause the waste and surface waters to be

collected in said ditches and precipitated on his land. Harlin had a verdict and judgment and the railroad company prosecutes here a petition in error.

1. The first point argued in the brief is that the petition does not state facts sufficient to constitute a cause of action. The petition, so far as material here, is as follows: "That the defendant * * carelessly and negligently constructed its ditches along * * * said railroad track * * * through the lands of plaintiff * * * in such a manner as to cause the waste and surface waters to collect along and adjoining the said railroad track, and to lead and precipitate the same directly on and over the adjoining lands of plaintiff; that during the years 1889 and 1890 the water so precipitated and turned from its natural course over upon said lands of plaintiff totally destroyed large portions of crops of corn and potatoes then growing upon said land and the property of plaintiff; and during the year 1891, by reason of the said careless and negligent construction of said ditches, large quantities of clay and sand were carried by the water from said ditches over and upon the lands of said plaintiff, totally destroying the crops of potatoes and corn then standing and the property of said plaintiff; and by reason of the depositing of said sand and clay on said land a large number of trees standing and growing thereon were totally destroyed, and a large quantity of said land was greatly and permanently damaged, so as to be unfit for the production of crops." The averments of this petition do not disclose the particular acts or omissions of the railroad company in constructing its ditches which the pleader alleges were negligent. It is not averred that the railroad company was guilty of negligence because it constructed ditches, or in constructing them where it did; nor that they were too narrow or too shallow. The allegation of negligence is a general one, and had a motion been made to require the pleader to specifically state in what the negligence of the railroad company consisted it would doubtless have been sustained. But a general

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allegation of negligence is good against a demurrer; and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant. (*Omaha & R. V. R. Co. v. Wright*, 47 Neb., 886.) We think, therefore, that the petition states a cause of action.

2. At the time the railroad company constructed its road over the lands of plaintiff they were owned by a man named Shannon, the plaintiff's grantor. Before the construction of the road over the lands Shannon, for a valuable consideration, conveyed to the railroad company a right of way over his lands. In this conveyance occurs the following: "For the consideration aforesaid do hereby release and discharge the said party of the second part [the railroad company], its successors and assigns, from all costs and damages which the said party of the first part has now sustained or shall at any time hereafter sustain in any way by reason of the construction, building, or use of the said railroad." On the trial of this case the railroad company offered in evidence, under proper pleadings, this right of way deed. It was excluded and this action of the district court, it is now insisted, was erroneous. The contention is that this was a release to the railroad company by Shannon of all damages which he had or might afterwards sustain by reason of the construction and operation of this road over his lands; that the release would bar this action were it brought by Shannon, and that the release is likewise binding upon his grantee. We agree with counsel for the railroad company that if this release would bar Shannon from maintaining this action, it likewise precludes his grantee, as the latter took the land burdened with the railroad company's easement, and he cannot maintain any action against the railroad company for damages growing out of the construction, operation, or maintenance of this road that his grantor could not maintain had he continued the owner of the land. The question, therefore, is whether the release in the right of way deed would bar this action had it been brought by Shannon.

The question is an important one, and to sustain his theory counsel for the railroad company have cited us to the following authorities:

Hoeffditz v. Southern P. R. Co., 18 Atl. Rep. [Pa.], 125. In this case Hoeffditz, for a valuable consideration, released and discharged a railroad company and its successors from all suits, claims, demands, and damages whatever by reason of its entry upon his land and appropriating a part thereof towards the construction of its railroad and works connected therewith. At the time of executing the release the railroad company had erected on the land acquired from Hoeffditz an embankment, in which was a culvert. Subsequently Hoeffditz sued the railway company for damages caused by the water which passed through this culvert; and the court held that the release was a bar to the action.

Updegrove v. Pennsylvania S. V. R. Co., 19 Atl. Rep. [Pa.], 283, is very much like the case at bar. Updegrove, for a consideration, deeded the railway company the right of way over his land, and released it from all claims for damages by reason of the taking and using of the lands for its railroad, or by reason of the construction and maintenance of its road over said land. The release appears to have been executed before the road was built, and the court held that this release barred Updegrove's action against the railroad company for damages caused by an overflow of water which resulted from the construction of a ditch and culvert on the right of way. The court based its decision upon the proposition that the damages sued for were in contemplation of the parties at the time of the execution of the right of way deed. In other words, that the damages sued for entered into and formed a part of the consideration paid by the railroad company for the right of way.

In *Radke v. Minneapolis & St. L. R. Co.*, 43 N. W. Rep. [Minn.], 6, Radke sued the railroad company for damages to his land caused, as he alleged, by the negligent construction of its railroad over or near his land. The neg-

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ligence complained of was that the railroad company neglected to put a culvert in an embankment. After the embankment was constructed Radke, for a consideration, conveyed to the railroad company a right of way over his land. But the right of way deed contained no release of damages. The court, however, held that the absence of this release from the right of way deed was unimportant, and said: "When he conveyed the premises to the defendant he knew that there was no culvert through the embankment * * where he now claims it should be placed in order to carry the water off his land, and he knew that the railroad embankment had already stopped the flow of water. It cannot affect the case that he may not then have apprehended the full extent of the injury which would result from this in future." To the same effect are *McCarty v. St. Paul, M. & M. R. Co.*, 17 N. W. Rep. [Minn.], 616; *Milwaukee & N. R. Co. v. Strange*, 23 N. W. Rep. [Wis.], 432.

In *Chicago, R. I. & P. R. Co. v. Smith*, 111 Ill., 363, the owner of certain land conveyed to the railroad company a right of way across the same. The deed recited, "For the purpose of constructing a railroad, and for all purposes connected with the construction and use of said railroad," and the court held that the right of way deed was a bar to an action by the owner's grantee against the railroad company for damages caused to his property by its engines throwing smoke, cinders, ashes, and sparks of fire thereon, and by the shaking of the house on said premises. But it is to be observed that the damages claimed resulted from the usual and ordinary operation of the road. Smith did not claim that the damages resulted from the negligent operation of the road; and the case rests upon the principle that when anything is granted, all the means to attain it and all the fruits and effects of it are granted also; and the court correctly held that the shaking of the house and the smoke, cinders, and ashes thrown by passing engines were necessarily incident to and inseparable from the operation of the

railroad, and were conclusively presumed to have been adjusted and settled by the consideration paid by the railroad company to the original owner at the time he executed the right of way deed. The case is not an authority for the contention of the railroad company in the case at bar. To the same effect are *Chicago & E. I. R. Co. v. Loeb*, 8 N. E. Rep. [Ill.], 460; *Chicago & E. I. R. Co. v. McAuley*, 11 N. E. Rep. [Ill.], 67.

In *St. Louis, V. & T. H. R. Co. v. Hurst*, 14 Ill. App., 419, it seems that the railroad company constructed its road over the land of Hurst. At or before this time, for a consideration, Hurst conveyed to the railroad company a right of way deed over his lands, and in this deed he released and relinquished all claims for damages by reason of the location, completion, and construction of the road. Years after the road had been completed and in operation the railroad opened a ditch by the side of its track, and Hurst claimed that the construction of this ditch changed the natural channel and flow of water and caused the same to flow upon his land, to his damage, for which he brought suit. On the trial the railroad company offered the right of way deed in evidence. The trial court excluded it and on appeal its action in this respect was reversed. The court seems to have placed its ruling upon the ground that the railroad company was entitled to have the jury say as a matter of fact whether the construction of the ditch complained of was a necessary act in the proper maintenance of the road, and held that if the construction of the ditch was necessary to the maintenance and operation of the road, that the release was a bar to the action; and said that before Hurst could recover damages he must make it appear that the acts of the railroad company amounted to a departure from or were not embraced within the purposes for which the release was made. This case is an authority so far as it goes against the contention in support of which it is cited.

Of these authorities the cases from Pennsylvania and Minnesota only, we think, can be said to sustain the

proposition contended for by counsel for the railroad company here. But our construction of this right of way deed is that by it Shannon acknowledged satisfaction for the value of all the land appropriated of his by the railroad company for its right of way, and released and discharged the railroad company from all damages which the remainder of his land had sustained or would sustain by reason of the non-negligent construction, maintenance, and operation of the road across his lands for all time. This right of way deed must be read, construed, and given the same effect that we would give to a judgment rendered in a condemnation proceeding instituted by the railroad company for right of way over Shannon's land; and had the railroad company pleaded and offered in evidence such a judgment instead of this right of way deed, the question would have been whether the damages sought to be recovered in this action were embraced in the condemnation judgment. It was not within the contemplation of the parties to this right of way deed that the railroad company would negligently construct, maintain, or operate its road; and if in the trial of the condemnation proceedings Shannon had sought to recover damages from the road upon that theory he could not have done so.

In *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. Law, 299, it was held: "A conveyance of land for railroad purposes or an assessment of the value of lands taken and damages under proceedings to condemn only bars the recovery of such damages as naturally and necessarily arise from the use of the premises for the authorized purpose; and will not bar the recovery of damages for injuries arising from an unskillful or improper construction or negligence in operating the road. For such damages the remedy by action remains notwithstanding the conveyance or condemnation."

In *King v. Iowa M. R. Co.*, 34 Ia., 458, it was held that in a proceeding to appropriate land for a right of way of a railroad already constructed, evidence of damages result-

ing from defective construction or the like is not admissible. While such damages may furnish cause of action to recover the same in an action therefor, they are not to be considered in assessing the compensation to be allowed the owner for the right of way appropriated.

In *Stodghill v. Chicago, B. & Q. R. Co.*, 43 Ia., 26, Stodghill sued the railroad company for damages for diverting a stream of water from its natural course, thus preventing it from flowing upon his land and depriving him of the use of the stream. The railroad company interposed as a defense that before it built its road over Stodghill's land it acquired from him, for a valuable consideration, the right of way; that its right of way passed over a creek, and that when it constructed its road it built a bridge over this creek; that some eight years afterward, on account of an increase of business and for the safety of travel, it took out the bridge and built a fill across the creek. The supreme court said: "As it is not claimed by appellant that greater rights were acquired by the plaintiff's deed than would have been acquired by proceedings in condemnation, we shall assume for the purposes of this opinion that they were the same. The question, then, which we are called upon to decide is this: Are the damages resulting to the land owner from the diversion of a natural stream of water, where such diversion is required by good railroading and a reasonably prudent construction of the road-bed, to be regarded as having entered into and been covered by the condemnation and appraisal?" and held that the right of way deed was not a bar to the action.

Hunt v. Iowa C. R. Co., 52 N. W. Rep. [Ia.], 668, is a case almost identical with the one at bar. Hunt sued the railroad company for damages sustained by him, as he alleged, by reason of its negligently constructing a ditch on its right of way, whereby surface waters destroyed his crops and deposited debris upon certain of his land and depreciated its value. The ditch complained of was constructed at the time the road was built across Hunt's

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land, and at this time another party owned the land. It does not appear whether the railroad acquired its right of way over the land by condemnation proceedings or by conveyance from the owner; but the case was tried and finally considered by the supreme court upon the theory that the railroad company at the time it built its road and constructed the ditch complained of did so in pursuance of a right of way granted to it for that purpose by the then owner of the land. The railroad company insisted that the damages sued for were such as the law conclusively presumes were included in the amount paid by the railroad company originally for its right of way. But the supreme court said: "From these facts we think it is clear that the damage sued for herein cannot be said to have been considered and settled for in condemnation proceedings." The court then cited *Drake v. Chicago, R. I. & P. R. Co.*, 63 Ia., 308, and *Sullens v. Railroad Co.*, 74 Ia., 659, and continued: "It is well settled that in assessing damages to the land owner for right of way taken, regard is had only to the immediate consequences of the appropriation. The owner is not, in such proceedings, compensated for damages which may thereafter result from negligent acts of the company committed after it makes the appropriation;" and after citing *Fleming v. Chicago, D. & M. R. Co.*, 34 Ia., 353, *King v. Iowa M. R. Co.*, 34 Ia., 458, *Miller v. Keokuk & D. M. R. Co.*, 63 Ia., 680, continued: "The plaintiff's grantor had a right to presume, when he conveyed the land to the company that built the road, that the work of constructing the road would be properly done; that sufficient culverts for the passage of surface water, at proper places, would be put in and maintained. * * * By neglect and carelessness on part of the defendant, surface water from several hundred acres of land * * * was gathered in the ditches of defendant, carried along, and finally discharged upon her [the plaintiff's] land. Damages arising from such an act have never been held to be included in the price paid for right of way." This has long been the doctrine of this court.

In *Burlington & M. R. R. Co. v. Schluntz*, 14 Neb., 421, it was held: "An award of damages under the statute for right of way for a railroad embraces only those damages which may reasonably be anticipated upon the assumption that the road will be built and operated with due care and skill, and with no unnecessary injury to property outside of the right of way." To the same effect see *Omaha Southern R. Co. v. Todd*, 39 Neb., 818, and *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb., 90.

The district court did not err in excluding the right of way deed from the jury.

3. The next argument is that the court erred in refusing to give to the jury an instruction, at the request of the railroad company, to the effect that though they found that the ditches of the railroad company were negligently constructed, and that by reason thereof Harlin had sustained injury as claimed by him, still, if they further found that the ditches were constructed and completed more than four years immediately preceding the commencement of this action, they should find for the defendant. In other words, the instruction was a request to the court to hold that Harlin's action was barred by the statute of limitations, as the evidence is undisputed that the ditches were constructed and completed more than four years before this suit was brought. The contention of counsel for the railroad company is that the cause of action made the subject of this suit was the negligent construction by the railroad company of its ditches, and that that cause of action arose when the ditches were completed. To sustain this contention we are cited, among others, to the following authorities:

City of North Vernon v. Voegler, 2 N. E. Rep. [Ind.], 821. In that case the city, by improving or grading one of its streets, changed the flow of the surface water so as to gather it into a channel and pour it upon Voegler's lots. For this he sued the city for damages, alleging that its negligent grading of the street had injured and depreciated his real estate. He recovered a judgment. Sub-

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sequently another overflow occurred and he again sued the city, but the court held that the judgment in the first action was a bar to the second, as all damages which Voegler has sustained to his real estate, both past and prospective, could have been recovered in the first action. The court treated the case as though both the actions brought by Voegler were for the permanent depreciation in value of his real estate by reason of the manner in which the city had improved its street. It is needless to remark that that is not this case.

Another case cited in support of the contention under consideration is *Baldwin v. Oskaloosa Gas Light Co.*, 10 N. W. Rep. [Ia.], 317. There Baldwin sued the gas light company for damages for maintaining its gas works in the immediate vicinity of his premises. The jury found that the gas works were permanent and the court held that this was equivalent to a finding that the injury was permanent, and that, therefore, Baldwin's cause of action accrued when the gas works were first located and that consequently his action was barred by the statute of limitations. To the same effect is *Stodghill v. Chicago, B. & Q. R. Co.*, 5 N. W. Rep. [Ia.], 495.

Another case cited by counsel is *Chicago & A. R. Co. v. Maher*, 91 Ill., 312. In that case the railroad company placed a protection to a drawbridge in a river and thus permanently depreciated the value of an adjoining lot. The owner of the lot subsequently conveyed it to Maher and she sued the railroad company for damages which the real estate had sustained by reason of the improvement which the railroad company had made adjoining her lot. But the court held that the injury caused to the real estate was permanent in its character, and the cause of action sued for arose when the improvement was first constructed. In other words, that the plaintiff's cause of action was the amount that her lot had been depreciated in value by reason of the improvement placed in the river adjoining it by the railroad company, and that this depreciation took place, this injury and this damage

accrued, at the time the improvement was erected. And this seems to be the principle upon which all the cases cited by counsel for the railroad company to support the contention under consideration rest; and such is the doctrine of this court, as announced in *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb., 90. And the principle that controls the case just cited is the same principle that controls the case at bar, namely, that the right of action accrued when the injury happened. (See *Omaha & R. V. R. Co. v. Standen*, 22 Neb., 343; *Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co.*, 48 N. W. Rep. [Wis.], 371.)

One of the defenses interposed in *Hunt v. Iowa C. R. Co.*, *supra*, was the statute of limitations. It will be remembered, in that case Hunt claimed damages because of the negligent construction by the railroad company of certain ditches on its right of way, whereby the surface water overflowed his land and destroyed his crops. The ditches were constructed more than five years before the action was brought. The court said: "It is clear that plaintiff herein could not have maintained an action until some actual injury was caused to her by diversion of the water by defendant. There is here no claim of any such injury until 1888—less than two years prior to the commencement of this action. True, the evidence shows various overflows of plaintiff's land prior to that, but if they caused any injury, no damage is claimed for it."

In *St. Louis, I. M. & S. R. Co. v. Biggs*, 12 S. W. Rep. [Ark.], 331, the court held that where a railroad company constructs its road-bed so that at times it causes overflow to adjoining lands, there may be as many recoveries as there are successive injuries, and the statute of limitations begins to run on the happening of the injury complained of, and not from the construction of the railway.

In *Austin & N. W. R. Co. v. Anderson*, 15 S. W. Rep. [Tex.], 484, it was said that in an action against a railroad company for damages caused by occasional overflows of surface water, which has been diverted from its natural channel by the construction of its road, the statute

of limitations does not begin to run from the construction of the road, but from the occurrence of each overflow, since each overflow constitutes a separate cause of action.

The court did not err in refusing to give the instruction requested.

4. The next argument is that the court refused to instruct the jury, on behalf of the railroad company, to the effect that if the jury found that the ditches were properly constructed with reference to the use of the same for railway purposes, that they should find for the railroad company. Of this instruction we remark, first, that the railway company was not prejudiced by the court's refusal to give it, as the court had already, at the request of the railroad company, instructed the jury to the effect that the railroad company could not be held liable if the ditches as constructed were properly constructed for railway purposes. Certainly the railroad company was not entitled to this instruction. The material issue on trial was not whether the ditches were sufficient and proper for the draining of the railroad company's right of way and road-bed, but the material issue was whether the railroad company had so constructed its ditches as to unnecessarily and negligently injure the property of its neighbor. The instruction under consideration refused by the court, if given, would have made the case turn on an immaterial issue. A railroad company might construct a bridge, an embankment, a culvert, or a ditch sufficient for the maintenance and operation of its road, and one entirely proper for that purpose, and yet the improvement made might be of such a character as to unnecessarily and negligently injure the property of an adjoining proprietor. A lot owner might construct a conduit across his lot in such a manner as to gather all the rains and melting snows and carry them off. This conduit might be properly constructed for the purpose for which it was intended; the highest degree of care and skill may have been exercised by the lot owner in its building, and it may have subserved in the most satisfac-

tory manner the ends for which it was built, and yet the operation of this conduit might injure the property of the lot owner's neighbor, and if it did the lot owner, when called upon by his neighbor for damages, could not successfully defend by saying: "The conduit is properly constructed for the purpose for which I intended it." This is not a suit in which the plaintiff claims damages because the railroad company did not properly construct its ditches for railroad purposes, but the principle upon which this action rests is that the railroad company, in the lawful possession and use of its property, so used and managed it as to unnecessarily and negligently inflict an injury upon its neighbor.

In *McCleneghan v. Omaha & R. V. R. Co.*, 25 Neb., 523, this court said: "A railroad company must construct its road not only with reference to the safety of the traveling public, but also with reference to the rights of adjacent land owners." The following cases rest on the same principle: *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897; *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb., 526; *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138; *Jacobson v. Van Boening*, 48 Neb., 80.

But it is said in support of the contention under consideration that this court has ruled, in *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb., 406, that if an improvement made by a railway company in the construction, operation, or maintenance of its road is properly made for railroad purposes, then if another sustain damages by reason of such improvement or the manner in which it is constructed or maintained he is without remedy. Once more we disclaim having ever consciously so held, and once more call attention to the fact that we do not so understand the *Morrissey Case*. As we said in *Jacobson v. Van Boening*, *supra*, an examination of the *Morrissey Case* discloses that we had in view the fact that there was neither pleading nor proof that the railroad embankment which caused the injury sued for in that action had been unnecessarily or negligently constructed; that is, the evidence did not

show that the embankment complained of was negligently constructed for railroad purposes; nor that the railroad company, by constructing the embankment that it did, in the manner that it did, unnecessarily and negligently caused the injury sued for. The embankment was properly constructed for railroad purposes, and the manner of its construction was not a negligent one with reference to Morrissey.

5. As already stated, in the action at bar Harlin claimed damages for the destruction of certain of his crops, for the destruction of certain trees growing upon his land, and for damages to certain portions of his land caused by the deposit of sand and clay thereon. With reference to the measure of Harlin's damages, the court instructed the jury that he was entitled to recover the value of the crops destroyed, the value of the trees killed; and that the measure of his recovery for the damage to his land was the difference between its value immediately before and immediately after the debris was deposited thereon. It is now insisted that the court adopted an improper measure of damages. The instruction was correct. (See *Fremont, E. & M. V. R. Co. v. Crum*, 30 Neb., 76; *Kansas City & O. R. Co. v. Rogers*, 48 Neb., 653.)

6. In addition to a general denial that Harlin had sustained any damages, and that it had been guilty of any negligence in constructing its ditches, the railroad company interposed the defense that if Harlin had sustained damages, as he claimed, that they resulted from a rain storm so unprecedented as to amount to the act of God. The district court, upon its own motion, instructed the jury that the burden of proof was upon the railroad company to establish this defense by a preponderance of evidence, and "if the defendant has failed to prove the above material allegation by a preponderance of the evidence, or the evidence is evenly balanced thereon, then you should find for the plaintiff." This instruction was excepted to and its giving is assigned as error. It is needless to say that the instruction was erroneous. The bur-

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den was upon the railroad company to establish this defense by a preponderance of the evidence; but even if the railroad company failed to establish the defense interposed by it, it did not follow that Harlin was entitled to recover. A careful examination of the entire charge of the court constrains us to the conclusion not only that the instruction was erroneous, but that its giving was prejudicial to the railroad company, and for the giving of this instruction the judgment of the district court must be reversed.

REVERSED AND REMANDED.

IRVINE, C., dissenting as to measure of damages as to trees destroyed.

TJEDE M. EHMEN, APPELLANT, V. VILLAGE OF GOTHENBURG, APPELLEE.

FILED FEBRUARY 16, 1897. No. 7119.

1. **Dedication of Public Park: REGISTRATION OF PLAT.** The statute provides for the acknowledgment and recording of plats subdividing tracts of land, and that the acknowledgment and recording of such a plat is equivalent to a deed in fee-simple of such portion of the premises platted as is on such plat set apart for streets and other public use. *Held*, That under this statute a plat, properly acknowledged and recorded, showing the subdivision of land into blocks and lots with streets traversing the same, with a block in the center thereof not subdivided into lots and with no alley traversing the same as was the case with other blocks, said block being designated "Ehmen's Park" (Ehmen being the owner of the land subdivided), operated as a statutory dedication of that block for a public park.
2. **Park: DEFINITION.** The term "park," as used in this country, means a tract of land within or near a town or city devoted to purposes of amusement, pleasure, or exercise; and while there are private parks, in this sense the term generally means one open to the public.
3. **Municipal Corporations: PARK: DEDICATION.** In view of the frequent use of the donor's name to designate a public park by him granted, the use of the term "Ehmen's Park" cannot be taken to imply the reservation of the land for Ehmen's private use.

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APPEAL from the district court of Dawson county.
Heard below before HOLCOMB, J. *Affirmed.*

Warrington & Stewart, for appellant.

W. D. Giffen and *W. J. Trotter*, *contra.*

IRVINE, C.

This was an action by Tjede M. Ehmen, on her own behalf and on behalf of her minor children, against the village of Gothenburg to quiet title to certain land claimed by the village as a public park. In 1885 William Ehmen, being the owner of the east half of the southwest quarter of section 10, township 11 north of range 25 west, caused a portion thereof to be surveyed and platted. He then duly acknowledged said plat in accordance with the statute and caused the same to be recorded. The land so platted is within the village of Gothenburg. The plat shows a subdivision of the land into blocks and lots, with continuous strips of land separating said blocks, evidently intended for streets and alleys, although not so designated on the plat. One of these blocks, in the center of the plat, is numbered 11, in accordance with the general course of numbering adopted. It is not, however, subdivided into lots, nor is there an alley through it, as is the case with the other blocks, and in addition to the number 11 it bears on the plat the words "Ehmen's Park." The plaintiffs are the widow and children of Ehmen, who died intestate in 1890. The sole question involved is whether there was a dedication of this block which operated to convey it to the village as public grounds. The statute then and still in force provides for the platting of subdivisions, the acknowledgment of the plat and its recording, and further, that "The acknowledgment and recording of such plat is equivalent to a deed in fee-simple of such portion of the premises platted as is on such plat set apart for streets or other public use, or as is thereon dedicated to charitable, religious, or educa-

tional purposes." (Compiled Statutes, ch. 14, art. 1, sec. 106.) A former statute, repealed when this was passed, contained this language in a similar connection: "There-upon such plat shall be equivalent to a deed in fee-simple from the proprietor or proprietors of all streets, avenues, alleys, public squares, parks, and commons, and such portion of the land as is therein set apart for public or city use, or is dedicated to charitable, religious, or educational purposes." (Session Laws, 1871, p. 2.)

It is contended in the first place that this change in the statute, omitting the specific words "avenues, alleys, public squares, parks, and commons," operated as a restriction, and that the mere designation of lands by such terms on the plat does not, under the present law, operate as a dedication, unless there exist elsewhere apt words clearly indicating the *animus dedicendi*. We do not think that the change in the phraseology of the statute was intended to accomplish any such purpose. On the other hand, we believe the object was to supply the place of the specific words by a more general term, which would cover, perhaps, other dedications than would fall within the old statute. The word "alley" is omitted, but it was certainly not intended that the mere designation on the plat of a strip of land as a street should operate as a dedication, while a like designation of another strip as an alley should not. The term "other public use," used in connection with "street," is sufficient to include a public square or park. It is true, greater uncertainty is likely to arise as to the purpose of the grantor in the case of such public grounds than in the case of streets, the necessity of the existence of which leaves the purpose of the grantor seldom in doubt. Still, where the designation on the plat is such as to clearly manifest the grantor's intent to dedicate land thereon for public use as a park, we think the statute is ample to constitute the acknowledging and recording of such plat a conveyance of the land for that purpose.

The appellants contend that the designation "Ehmen's

Park" is insufficient to imply an intention to dedicate it as public land, and we are referred in this connection to the common-law definition of the term "park," as well as to certain cases, such as *City of Logansport v. Dunn*, 8 Ind., 378, and *City of Pella v. Scholte*, 24 Ia., 283, where the word "square," or some similar word, has been held in itself ambiguous and not to operate on a plat as a dedication in the absence of evidence *aliunde* establishing the grantor's intent in using the word. Without questioning the correctness of the cases referred to under their peculiar facts, we think they have no application here. In the United States we have no parks within the meaning of the forestry laws of England. The term has never in this country been used in that sense. Indeed, such signification is not now in England exclusive. To demonstrate this, we need only refer to "Hyde Park," in London. The universal meaning of the term in this country is a tract of land in or near a city or town, and devoted to purposes of amusement, pleasure, or exercise. There may be private parks, but the use of the term to designate private property is the exception, and public use is implied by the term in the absence of language or surrounding facts implying the contrary. In *Price v. Inhabitants of the City of Plainfield*, 40 N. J. Law, 608, it was said: "A park in a city means to the sense of every person a place open to every one." In *People v. Green*, 52 How. Pr. [N. Y.], 440, the term "park" is defined as "a piece of ground adapted and set apart for purposes of ornament, exercise, and amusement." This is the sense in which it is several times used in our statutes, as, for instance, the former statute on the subject of village plats already referred to, and the so-called charter of metropolitan cities (Compiled Statutes, ch. 12a, sec. 108), whereby a board of park commissioners is established to control such parks.

But it is insisted that if the word "park" alone would indicate a dedication to public purposes, the term "Ehmen's Park" implies private ownership. We do not

think so. The dedication of land by proprietors for public purposes is now quite frequent, prompted sometimes by pure motives of philanthropy, at others by a desire to thereby enhance the value of surrounding property, and sometimes, no doubt, by both motives. In such cases the name of the grantor is quite frequently attached to the park by the public by way of grateful recognition of the gift, or by the grantor himself, through a not unnatural ambition to so perpetuate the memory of his gift. We think this custom, together with the almost universal use of the word "park" to designate public grounds, fully warranted the trial court in finding that the term was here so used.

There was a complete statutory dedication of the land in controversy, and we need not consider the questions raised as to a common-law dedication, title by estoppel, or questions relating to the evidence on those points.

AFFIRMED.

J. GRIFFITH, APPELLEE, V. JAMES JENKINS, APPELLANT.

FILED FEBRUARY 16, 1897. No. 7083.

1. **Judicial Sales: RAISING BID: CONFIRMATION: REVIEW.** An order confirming a judicial sale disclosed that the purchaser in open court raised his bid, but did not disclose why he did so or that his action in so doing was in performance of any condition imposed by the court as essential to the confirmation of the sale. *Held*, That the confirmation of the sale at the higher price was without prejudice to the former owner, provided the sale as reported was regular.
2. ———: ———: ———: ———. The record examined, and *held* not to disclose any irregularity which would have justified the trial court in setting aside the sale as reported.

APPEAL from the district court of Buffalo county.
Heard below before HOLCOMB, J. *Affirmed*.

F. G. Hamer, for appellant.

Warren Pratt and E. C. Calkins, contra.

IRVINE, C.

This is an appeal by the vendee from an order confirming a sale of land made under a decree foreclosing a contract for the sale thereof for default of payment. The sole ground urged for reversing the order of the district court is that the order of confirmation was conditioned upon the purchaser's raising his bid from \$1,956 to \$2,500.

It is contended that the court may not impose conditions changing the terms of the sale, and confirm the sale upon compliance with those conditions; and that the court cannot open up the sale and then accept bids after the officer has made his return. Generally speaking, there is no doubt that these contentions are correct, but the record hardly discloses a basis for their application in this case. The sheriff who made the sale reported the land sold to Griffith for \$1,956, which was slightly more than two-thirds the appraised value of Jenkins' interest. A motion was filed to set aside the sale, and thereafter appears an entry as follows: "Now on this 6th day of January, 1894, this cause being called, plaintiff in open court raises his bid made herein to \$2,500; thereupon the court doth order that the surplus over and above the amount of the decree in controversy be and the same is hereby directed to be applied on the matured installments of the contract sued on, but not included in the decree. This cause now coming on for further hearing upon the motion of the plaintiff for a confirmation of the sale made herein, and it appearing to the court that the sheriff had made due return to the order of sale issued herein, after carefully examining the same, together with his report of the proceedings had therein, finding them regular and according to law in all respects, the court doth hereby approve the same." Then

followed an order of confirmation. We find nowhere in the record any reason disclosed for the purchaser's raising his bid after the sale was reported. It does not appear that the court required such action as a condition for confirming the sale. On the other hand, the court expressly finds that the sale was regular and according to law in all respects. It may be true that the purchaser would not raise his bid without some reason therefor, but the record wholly failing to disclose such reason, we cannot infer that it was to meet a condition imposed, and not evidenced by the record, upon the performance of which only the sale would be confirmed. If the sale was in fact regular and the purchaser entitled to its confirmation at the price reported, the action of the court in accepting an increase of the bid was not prejudicial to the defendant. If the sale was irregular and the defendant was, therefore, entitled to have it set aside, then it is clear that the court could not cure the error by accepting an increased bid. It would in such case be the right of the parties to have a new sale, with open bidding, at a proper place and after proper advertising. As already stated, the defendant complains only of what he calls the condition attached to the order of confirmation, and we might be justified in concluding from that, as well as from the express finding of the court that the sale was regular, that the order of confirmation was proper under the original bid. In the reply brief, however, it is suggested that there were such irregularities as would have justified the court in setting aside the sale, and that the order of confirmation was, therefore, prejudicial to the defendant. The first reason suggested is that the appraisement was so low as to justify an inference of fraud. Among the forty and more reasons set out in the motion to set aside the sale in the district court it is alleged that the appraisement is too low, but it is not alleged that it was fraudulent. In the absence of fraud an appraisement can be attacked on the ground that it is too low only by motion filed before the sale. (*Vought*

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v. Foxworthy, 38 Neb., 790.) Such a motion does not appear in the record, and the assignment in the motion to set aside the sale for the first time that the appraisement was too low presented no question for the district court to act on and did not suggest fraud. Moreover, the proof is insufficient to establish fraud. While there is considerable evidence tending to show that the appraisement was too low, there is much evidence to sustain the action of the appraisers; and, indeed, the proof as to value varies less than we usually find the case in such records.

The land is not described in the same terms in the decree and in the order, notice, and report of sale, and it is claimed this variance was a cause for setting the sale aside. In the decree the land is described as "Lots numbered 405 and 406 and west half of lot numbered four hundred and four, less five feet on the left side thereof, according to the recorded plat of School Section Addition to the city of Kearney, Nebraska." In the petition, in the contract attached thereto, in the order of sale, in the published notice, and in the report the description is "Lots numbered 406 and 405 and the west half of lot numbered 404, less five (5) feet on the east side of the west half, in School Section Addition to the city of Kearney." The latter description seems reasonably clear. The description in the decree refers to the recorded plat of the addition. If that plat as recorded is arranged as is usual, with the north at the top of the page, then it would seem that the land described in the decree is not exactly the tract sold. If, however, the plat as recorded be inverted, then the five feet on the left side of the west half of lot 404 is also the five feet on the east side of the west half of that lot, and the variance is not material. There is no evidence on this subject preserved by the record. The defendant does not now complain of this variance as a substantive ground for setting aside the sale, but only as disclosing prejudice in confirming it at the higher price. The court found the proceedings regular, and if there was in fact a variance between the decree

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and the land actually sold, this was such a manifest error that the court certainly could not have considered a raising of the bid sufficient to cure it. We do not think that error in this respect affirmatively appears.

We have examined the other reasons alleged for setting aside the sale, and we find that they receive no support from the record.

AFFIRMED.

ROSALIE FARLEY V. WILLIAM E. PEEBLES ET AL.

FILED FEBRUARY 16, 1897. No. 6996.

1. **Witnesses: PRIVILEGED COMMUNICATIONS: ATTORNEYS.** Generally, in order to bring communications made to a lawyer within the privilege accorded by the common law and declared by the statute, it must be shown that the relationship of attorney and client existed at the time the communications were made. While this rule has its exception in the fact that communications properly made in negotiating for the employment of an attorney are likewise privileged, still neither the rule nor the exception, neither the letter nor the spirit of the common law or of the statute, extends the privilege to communications voluntarily made to a lawyer after he has informed the person making them that he will not and cannot accept the employment to which the communications relate.
2. **Conspiracy: EVIDENCE: OVERT ACTS.** A conspiracy, like other facts, may be proved by circumstantial evidence, and one means of proof is by showing overt acts of the individuals charged with conspiring. From the fact that different persons at different times by their acts pursue the same object, the jury may, in connection with other facts, infer the existence of a conspiracy to effect that object.
3. ———: ———: **ADMISSIONS.** In order to justify the admission in evidence, for the purpose of establishing the conspiracy, of such acts of individuals it is not necessary to first prove by other evidence the existence of the conspiracy.
4. ———: ———: **DECLARATIONS.** Declarations made in pursuance of the object are likewise admissible, but to be so they must not be merely narrative of past occurrences or statements of future purposes; they must tend so directly toward the accomplishment

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of the alleged common object as to constitute a part of the *res gestæ*.

5. ———: ———: ———. Evidence of such acts or declarations may have a twofold purpose: First, the proof of the existence of the conspiracy; second, the conspiracy having been proved, to charge each member thereof with the consequence of such acts or declarations. For the first purpose the evidence is admissible generally as against all. For the second purpose it cannot be considered against those not participating in the acts or declarations, unless from all the evidence the existence of the conspiracy has been proved.

ERROR from the district court of Cuming county. Tried below before NORRIS, J. *Reversed*.

The facts and issues are stated by the commissioner.

Breckenridge & Breckenridge and C. C. McNish, for plaintiff in error:

It was error to exclude proof not only of acts and declarations resulting in plaintiff's damage, but of facts tending to show the unlawful combination itself, as against any and all defendants not shown to be present and directly connected with the particular declaration or fact. (*Nudd v. Burrows*, 91 U. S., 426; *Spies v. People*, 122 Ill., 1; *United States v. Gooding*, 12 Wheat. [U. S.], 469; *Ochs v. People*, 124 Ill., 399; *St. Paul Distilling Co. v. Pratt*, 45 Minn., 215; *Regina v. Duffield*, 5 Cox C. C. [Eng.], 404; *Mapstrick v. Ramge*, 9 Neb., 390.)

The testimony of the witness Sloan was not properly excluded as privileged communications. (*Home Fire Ins. Co. v. Berg*, 46 Neb., 600; *Henry v. Nubert*, 35 S. W. Rep. [Tenn.], 444; *In re Turner*, 31 Atl. Rep. [Pa.], 867; *Romberg v. Hughes*, 18 Neb., 579; *Clay v. Tyson*, 19 Neb., 530; *George v. Silva*, 68 Cal., 272; *Thiesen v. Dayton*, 82 Ia., 74; *Plano Mfg. Co. v. Frawley*, 68 Wis., 577.)

Guy T. Graves and Jay & Beck, contra.

References: *Lawson v. State*, 32 Ark., 220; *Nelson v. Becker*, 32 Neb., 99; *People v. Barker*, 27 N. W. Rep.

[Mich.], 539; *Clay v. Tyson*, 19 Neb., 530; *Hapgood Plow Co. v. Martin*, 16 Neb., 27; *Rupert v. Penner*, 35 Neb., 587; *Omaha S. R. Co. v. Beeson*, 36 Neb., 361; *United States v. Cole*, 5 McL. [U. S.], 513.

IRVINE, C.

Rosalie Farley brought this action against William E. Peebles, A. C. Abbott, D. N. Wheeler, George F. Chittenden, and Harry F. Swanson, alleging in her petition that she is a member of the Omaha tribe of Indians; that there was made to her by said tribe, on the 1st of May, 1892, a lease of 21,632.18 acres of the unallotted tribal lands of said Omaha Indians for a period of five years, or until the allotment of the lands leased; that said lease was made for grazing purposes, rent being reserved at twenty-five cents per acre per year; that said lease was duly approved by the commissioner of Indian affairs and the secretary of the interior; and that plaintiff took possession under said lease of the lands therein described; that the lands were of great value to her for grazing purposes, and that she derived large profits therefrom; that in 1892 the defendants conspired together to interfere with her rights and to destroy her business of grazing and pasturing cattle upon said lands, and of renting said lands to owners of cattle for grazing purposes; and pursuant to said conspiracy the defendants caused to be printed and circulated among the customers of plaintiff a notice purporting to be signed by the members of the council of the Omaha tribe, which notice was to the effect that plaintiff's lease had expired, and that any cattle or stock found on said lands after May 1, 1893, would be taken up for trespass and held for damages. She further alleged that said notice was not in fact issued by the Omaha tribe; that many of the council knew nothing thereof and never signed or authorized the signing thereof, all to the defendants' knowledge; that the sole purpose of issuing said notice was to prevent plaintiff from securing cattle to graze on said lands; that in fur-

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ther pursuance of said conspiracy the defendants caused said notice, with comment, to be published in a newspaper in Thurston county, which newspaper was published by the defendant Swanson; and that said newspaper circulated largely among plaintiff's patrons. The plaintiff further averred that in pursuance of said conspiracy, and for the purpose of ruining plaintiff's business, the defendants procured the institution in the circuit court of the United States of an action in equity in the name of certain members of the council of the Omaha tribe, appearing for themselves and other members of the tribe, the object whereof was to obtain a decree, contrary to the facts, adjudging the plaintiff's lease to be canceled, and that said action was begun for the purpose of slandering plaintiff's title; that when said tribe learned of the commencement of said action it repudiated the same; that several of the ostensible plaintiffs to said action did not authorize the suit to be brought and did not sign or swear to the bill, although said bill had attached the jurat of one of the defendants, a notary public for Thurston county, indicating that all said plaintiffs had made oath thereto. Plaintiff further alleged that by reason of such acts certain persons who had executory contracts with the plaintiff for the pasturing of cattle had been induced to cancel the same, and that other persons had been prevented from entering into contracts with her, all to her damage in the sum of \$8,000. The answer, while admitting certain allegations of minor importance, denied most of the allegations contained in the petition, including all charges of conspiracy and wrongful acts. A trial to a jury resulted in a verdict, followed by judgment, for defendants. The plaintiff prosecutes error.

In addition to the foregoing statement, it may be well to say that the Omahas are a tribe of Indians having their residence chiefly in Thurston county. They were formerly in possession of a reservation, but by virtue of certain treaties and acts of congress a portion of their

land was sold for their benefit, and a large portion of the remainder was allotted in severalty to members of the tribe. There remained unallotted a considerable body of land, subject to lease for grazing purposes under certain supervision by the Indian bureau, for the benefit of the tribe. While the members of the tribe have adopted the habits of civilized life, a council composed of twelve members is retained and exercises a certain control over property still enjoyed by the members of the tribe in common. It is to this communal property that this suit relates. These last facts are stated partly from the evidence, and partly as derived from the treaties and acts of congress and as matters of public notoriety, of which the court can properly take notice.

In view of these facts it cannot be questioned that the plaintiff stated a cause of action. She alleged, more in detail than we have stated, a valid lease to herself of a large tract of land, the equitable ownership of which, if not the legal title, rests in the tribe of which she is a member; a conspiracy among persons outside the tribe to deprive her of the beneficial enjoyment of that lease; this conspiracy carried into effect by the publication of a false warning purporting to be, but not, in fact, signed by those having control of the tribal affairs, whereby strangers would be induced to avoid contracting with plaintiff on the faith of her lease; the institution of an action in the name of the Indians, but without their authority, to cancel her lease; and damages as the result of such acts.

There are many assignments of error, but we address our attention to only two groups, which present, as we think, the two questions of most importance developed by the trial. The other assignments relate either to matters of minor importance, to matters probably accidental to the first trial and not likely to recur, or to questions not properly preserved by exceptions or in the motion for a new trial.

Thomas L. Sloan was called as a witness for the plaintiff.

iff. Mr. Sloan is a member of the bar of the state, practicing in Thurston county, and is himself an Omaha Indian. It was sought to show by Sloan that Chittenden, one of the defendants, had approached him, seeking to retain him as an attorney in business against Mrs. Farley; that Sloan had informed him that he was generally retained on behalf of Mrs. Farley, and that he therefore could not accept a retainer against her; that thereafter Chittenden had made certain statements to him to the effect that Wheeler & Chittenden, who were partners in the real estate business, desired to secure Sloan's services to assist them in obtaining control of the land in controversy as against Mrs. Farley, and to use his influence with the tribe for the same purpose. Still further, that at a later time, and after information as to Sloan's retainer on behalf of Mrs. Farley, the defendant Peebles had joined the defendants Wheeler & Chittenden in a further effort and further statements to the same effect, and that an offer had been made Sloan of a large retainer if he would accept such employment, and also an offer to indemnify him against any damages which Mrs. Farley might recover on account of the breach of his contract with her. The court's rulings on this matter were not very consistent. The offers were made a number of times. A portion of the evidence was admitted. Other portions were excluded, but the result of it all was an order striking the whole of Sloan's testimony from the record. It is probable that some portions were incompetent and should have been excluded, but there can be no doubt that a considerable portion of that excluded or stricken out should have been admitted. The objection was on the ground that it was sought to elicit from the witness privileged communications made to the witness as an attorney at law. Our statute provides (Code of Civil Procedure, sec. 333): "No practicing attorney, counsellor, * * * shall be allowed, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary

and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." So far as we have quoted, the statute is merely declaratory of the common law. The portion not quoted relates merely to communications made to physicians, surgeons, priests, and ministers of the gospel. There is no doubt that generally, in order to surround such a communication with the protection of either the common law or the statute, the relationship of attorney and client must exist at the time the communication is made. (*Romberg v. Hughes*, 18 Neb., 579.) Nor do we have any doubt, on the other hand, that to enforce the spirit of the statute it is necessary and proper to hold that the protection extends also to communications made to an attorney in negotiating to employ him as such. (*Nelson v. Becker*, 32 Neb., 99.) But the offer here made was not of that character. It was to show communications made after the defendants had been informed that no employment would or could be accepted. Such communications are neither within the letter nor the spirit of the statute or of the common law, and are not privileged. (*Clay v. Tyson*, 19 Neb., 530; *Setzar v. Wilson*, 4 Ired. [N. Car.], 501.) Such portions, at least, of the evidence sought to be elicited from Sloan as were not incompetent under the foregoing statement should have been admitted, or should not have been stricken out.

The other subject which we deem it proper to consider is presented by numerous rulings upon the evidence, and by at least nine assignments of error. These we shall not consider in detail, although a detailed consideration might disclose that under the particular questions asked and offers of proof made some of the rulings may have been correct. Still, we are convinced that most of them were wrong, and that the court proceeded on an erroneous view of the law. The plaintiff, without first establishing by direct or by circumstantial evidence of a general character the existence of the conspiracy complained of, sought to show various acts of one or another

of the defendants, mostly by way of conversations with members of the council of the Omaha tribe. In a general way, it may be said that these were communications seeking to ascertain the views of the Indians with regard to the Farley lease; seeking to induce individual members of the tribe to exert themselves to have the land allotted in severalty; seeking to induce them to institute an action for the purpose of annulling the lease; also communications with reference to the issuing of the notice or circular complained of in the petition, and facts with regard to the institution of the action in the federal court. It was not offered to show, in any instance, that all the defendants took part or were present at the time of the acts sought to be proved. In each instance the court admitted the evidence only as against the defendants present at the time, and at the close of the trial the court instructed the jury that before it could consider any admission, declaration, or act of any of the defendants as to the alleged conspiracy, it must first find that there was a conspiracy unlawfully entered into by the defendants to injure Rosalie Farley. As an abstract statement of law, when properly understood, this instruction would be free from error; but coming, as it did, after a multitude of rulings on the evidence, excluding evidence of all acts or declarations as against those not present, it served to impress upon the jury as a rule of law that the conspiracy must be established otherwise than by acts or declarations of any portion of the defendants, and that such acts could not be considered for any purpose without preliminary evidence of another character as to the existence of the conspiracy. This, we think, was wrong. A text-writer on evidence, whose work has attained such a standing that it is in itself almost authoritative, says on this subject: "The evidence in proof of a conspiracy will generally, from the nature of the case, be circumstantial. Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have

that design, and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same, so as to complete it, with a view to the attainment of that same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object." (3 Greenleaf, Evidence, sec. 93.) So, also, another writer has said: "A conspiracy is proved either expressly or by the proof of facts from which the jury may infer it. It is seldom proved expressly; nor can a case easily be imagined in which that is likely to occur, unless where one of the persons implicated in the conspiracy consents to be examined as a witness for the prosecution. In nearly all cases, therefore, the conspiracy is proved by circumstantial evidence, namely, by proof of facts from which the jury may fairly imply it. It is usual to begin by showing that the defendants all knew each other, and that a certain degree of intimacy existed between them, so as to show that their conspiring together is not improbable; and if to this can be added evidence of any consultations or private meetings between them, there is then a strong foundation for the evidence to be subsequently given, namely, of the overt acts of each of the defendants in furtherance of the common design. But although the proof above mentioned is desirable, because it satisfies the jury as you proceed and they are better able to apply the evidence of the overt acts when it is afterwards given, yet it is not essentially necessary, as the jury may imply the conspiracy of all from the overt acts of each. * * * Perhaps the safer rule to lay down upon the subject would be that, wherever the writings or words of any of the parties charged with or implicated in a conspiracy can be considered in the nature of an act done in furtherance of the common design, it is admissible in evidence, not only as against the party himself, but as proof of an act from which (*inter alia*) the jury may infer the conspiracy itself." (Archbold, Crimi-

nal Practice & Pleading, 619*, 621*.) These views are in accordance with numerous adjudicated cases, among them *Regina v. Murphy*, 8 C. & P. [Eng.], 297; *Clune v. United States*, 159 U. S., 590; *United States v. Cole*, 5 McL. [U. S. C. C.], 513; *United States v. Doyle*, 6 Sawyer [U. S. C. C.], 612; *Spies v. People*, 122 Ill., 1; *Ochs v. People*, 124 Ill., 399; *Jones v. Baker*, 7 Cow. [N. Y.], 445. The last cited case has been referred to with approval by this court in *Mapstrick v. Range*, 9 Neb., 390. We think, upon reflection, one must be convinced that such evidence should be admitted in the absence of a positive rule of law to the contrary. The ordinary rules of evidence require it. As stated in almost every case upon the subject it is impossible from the very nature of the case to obtain direct credible evidence of an actual meeting together of the conspirators and an express agreement among them to pursue the common object. The fact that there exists among them a concert of minds must in nearly all cases be established by circumstances, and among such circumstances there can be none of more logically convincing force than the fact that one person at one time, another person at another time, and a third person at a third time have been working along the same lines and by the same general methods to effect the same object. In admitting such evidence the court should not, and it was not in this case asked to, infringe against the rule excluding hearsay testimony, or the rule restricting the effect of admissions to the parties making them. In the language of the supreme court of the United States, acts or declarations are in such cases admissible only "in reference to the common object and forming a part of the *res gestæ*." (*American Fur Co. v. United States*, 2 Pet. [U. S.], 358.) What is merely narrative of a past occurrence, or what is merely expressive of a future purpose, would not generally be so admissible; but an act performed, a declaration made, a writing made or delivered, as a part of the matter in dispute, that is, in itself tending to advance the common purpose or object of the alleged conspiracy, is

neither hearsay nor merely the admission of one of the parties. It is an overt act in pursuance of the object. From such overt acts of each of the alleged conspirators the jury may, together with other evidence, infer the existence of the conspiracy itself. We are aware that it is the established rule that the acts or declarations of one of the alleged conspirators are not admissible as against the others unless the conspiracy itself be established, in which case the act or declaration of one becomes that of all; and we are aware, also, that it has sometimes been stated that such acts or declarations are not admissible in evidence until the conspiracy itself is first *prima facie* established. It has always been said, however, in connection with this, as in other cases, that the order of proof must rest within the discretion of the trial court. If an act or declaration is of such a character as to tend to establish the existence of the conspiracy, then it should not be excluded merely because it is also of such a character as to bind all the conspirators by its consequences in the event of the establishment of the conspiracy. In short, we conceive the rule to be that a conspiracy may be established by circumstantial evidence, including overt acts in pursuance thereof by individual conspirators, the others not being present or participating in such acts; but that such individual acts are not admissible when of the character of subsequent admissions, and they should not ordinarily be admitted when not so directly tending to the accomplishment of the common purpose, as also to tend by that fact toward proving the existence of the conspiracy, unless the existence of such conspiracy be first *prima facie* proved. It is, of course, proper in instructing the jury, when such a method of proof has been resorted to, to make it clear that the proof of such acts or declarations has a twofold purpose: In the first place, to establish the existence of the conspiracy, and in the second place, when such conspiracy has been established, to charge each person proved to be a party to it with all the consequences of

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such acts or declarations. For the purpose of inquiring whether a conspiracy has been proved, such acts or declarations should be considered in connection with all the defendants; but unless by evidence connecting a particular defendant directly with the conspiracy he has been proved a party thereto, such acts or declarations are not to be considered for the purpose of charging him with their consequences.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. GERMAN SAVINGS
BANK, APPELLANT.

FILED FEBRUARY 16, 1897. No. 9000.

1. **Banks and Banking: INSOLVENCY: AUTHORITY OF RECEIVER: PARTIES.** In a proceeding under chapter 8, Compiled Statutes, to wind up an insolvent banking corporation, the corporation, even after consenting to the appointment of a receiver, remains an interested party and may be heard to resist an application for an order conferring authority upon the receiver not within the original order appointing him.
2. **Order on Receiver to Sue Stockholders: REVIEW.** An order was made *ex parte* directing a receiver to sue stockholders for their unpaid subscriptions. The defendant corporation moved to discharge the order. The motion was overruled and the corporation excepted. *Held*, That it might appeal from this order.
3. **Banking Corporations: INSOLVENCY: LIABILITY OF STOCKHOLDERS: ENFORCEMENT OF CLAIMS.** The constitution provides: "In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted, the original subscribers thereof shall be individually liable to the extent of their unpaid subscriptions." (Constitution, art. 11, sec. 4.) The banking act (Compiled Statutes, ch. 8, sec. 35) provides: "Whenever any receiver or any incorporated bank shall file a report with the court or judge thereof, setting forth the fact that in the opinion of such receiver, the assets of such bank are not sufficient to pay the liabilities of such bank within a reasonable time, the court or judge may order such receiver to proceed at once to collect from the several stockholders of such bank, who are liable therefor, any or

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all such liabilities as shall be necessary for the payment of all the liabilities of such bank." *Held*, (1) That this statute refers to liabilities of stockholders upon their stock; (2) that the constitution makes the liability of subscribers for unpaid subscriptions for the purpose of paying debts of the corporation a secondary liability, to be enforced only after the amount of the debts has been judicially ascertained and other corporate property has been exhausted; (3) that a proceeding by the receiver of an insolvent bank to collect unpaid subscriptions to its capital stock is on behalf of creditors of the corporation and is a "case of claims" against the corporation within the meaning of the constitution; (4) that the statute quoted, in so far as it attempts to authorize actions to recover unpaid stock subscriptions before the corporate debts have been judicially ascertained and the corporate property exhausted, is in conflict with the constitution and void.

APPEAL from the district court of Douglas county.
Heard below before KEYSOR, J. *Reversed*.

Joel W. West, for appellant.

Ralph W. Breckenridge, contra.

IRVINE, C.

The attorney general, acting under authority of chapter 8 of the Compiled Statutes, entitled "Banks," applied, in the name of the state, for the appointment of a receiver of the German Savings Bank, a corporation conducting a banking business in Omaha. A receiver was appointed, without objection by the defendant, to take possession of the books, records, assets, and property of said bank, together with all debts and evidence of debts due thereto, and empowered to collect all such debts, dues, and claims and reduce all assets as speedily as possible to money; to sell and dispose of all property belonging to the bank; to compound any and all bad or doubtful debts on such terms as should be thereafter ordered; and, in general, to do all acts essential and necessary to a speedy closing up and winding up the affairs of said bank. On the 25th of November, 1896, the receiver made a report to the court of the assets, together with his estimate of their value, and he further reported that in his opinion such assets

were not sufficient to pay the liabilities of the bank within a reasonable time, whereupon the court entered an order, apparently *ex parte*, reciting that only \$100,000 of the \$500,000 subscribed capital stock had been paid in, and directing that an assessment be levied on the subscribers of eighty per cent of their respective subscriptions, and that the receiver institute actions against all stockholders in default of payment of said assessment to collect the amounts so assessed. On the 6th of January, 1897, the bank filed a motion to vacate the order because it was made without notice to the defendant, because it was made contrary to the provisions of section 4, article 11, of the constitution, entitled "Miscellaneous Corporations," and because it was prematurely and improvidently made. This motion was overruled and the bank appeals.

Two questions suggested in the briefs, but not much insisted upon in oral argument, relate to the right of the corporation to resist the order complained of and to the appealability of such order. The theory of the appellee seems to be that from the time the receiver is appointed the corporation as such is without standing in court to object to or resist such applications as the one in this case made. But we think this contention without merit. The action is against the corporation. It has for its object as a provisional and immediate remedy the appointment of a receiver to take charge of the assets of the corporation, to liquidate such assets and to apply them, all under the direction of the court, to the satisfaction of the corporate debts. If the assets prove more than sufficient to discharge the debts, the surplus, both by direction of the statute and by general principles of equity, is to be returned to the persons entitled thereto, to-wit, the officers of the corporation. The proceeding is not one merely *ex parte* whereby the court, as a sort of administrator, winds up the estate, but it is in its nature an adversary proceeding. The fact that the corporation consented or acquiesced in the appointment of the receiver and in the general directions given him by the first order, might properly

estop the bank from afterwards asserting that such order was improvidently made. But the corporation remains the defendant in the case. It has rights which it is entitled to protect. The corporation as such is interested in an economical and prudent management of its affairs, and, as the defendant in the case, and the only defendant, it has the right to be heard in subsequent proceedings. Its consent to the first order does not imply an entire abandonment of its corporate functions or estop it from resisting applications for further orders, at least when such further orders are not clearly for the purpose merely, of carrying out the order to which it did consent. While its property has been taken from its possession by the order appointing the receiver, the corporation is not by such order dissolved, and there remains in the corporation at least a contingent residuary interest in such property which makes it not only nominally but actually an interested party in the further proceedings, entitled to protect itself against improvident or unauthorized dealings with such property. The statute, by express terms, makes such orders appealable, section 275 of the Code of Civil Procedure providing that "All orders appointing receivers, giving them further directions and disposing of the property, may be appealed to the supreme court in the same manner as final orders and decrees." Nor can any objection to the appeal be urged on the ground that no exception was taken to the original order. That order having been made *ex parte* and a motion to vacate it having been made and an exception taken to the order overruling such motion, the right to appeal was preserved. (*Clarke v. Nebraska Nat. Bank*, 49 Neb., 800.)

We are thus brought to a consideration of the propriety of the order itself. The statute (Compiled Statutes, ch. 8, sec. 35) provides: "Whenever any receiver of any incorporated bank shall file a report with the court or judge thereof, setting forth the fact that in the opinion of such receiver, the assets of such bank are not sufficient to pay the liabilities of such bank within a reasonable time, the

court or judge may order such receiver to proceed at once to collect from the several stockholders of such bank, who are liable therefor, any or all such liabilities as shall be necessary for the payment of all the liabilities of such bank." This provision manifestly applies to the liabilities of stockholders as such, because the mere fact that a person otherwise indebted to a bank was a stockholder would not prevent the receiver under general authority conferred upon him in pursuance of the statute from enforcing such liability. The order was, therefore, strictly in conformity with the statute and made on the showing required by the statute to justify such order, and the precise question, therefore, presented is whether the statute, so far as we have quoted it, is a constitutional enactment. Article 11 of the constitution of 1875 deals with corporations. It is subdivided into three parts, one relating to railroad corporations, one to municipal corporations, the third to miscellaneous corporations. Section 4 of the last subdivision is as follows: "In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscriptions, and the liability for the unpaid subscription shall follow the stock." Another provision not essentially connected with this, but which is so similar in character that one should never be considered without reference to the other, is section 7 of the same subdivision, which reads as follows: "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder; and all banking corporations shall publish quarterly statements under oath of their assets and liabilities." It will be observed at once that the general effect of these two provisions is to establish a liability, free from inter-

ference by the legislature, on stockholders of all corporations, subject to certain conditions, for their unpaid subscriptions; and in the case of banking corporations, an additional liability for a further amount equal to the amount of stock held by any person for the purpose of paying debts incurred while such person is a stockholder. The conditions attached to the enforcement of the first liability are that its enforcement must be in cases of claims against corporations; that the amount of such claims shall be first ascertained, and that the corporate property shall have been exhausted.

Does the banking act, in so far as it attempts to confer authority upon the court to authorize the receiver of a bank, merely upon a report that in his opinion the assets of the bank are insufficient to pay its liabilities within a reasonable time, to collect this unpaid subscription, conflict with section 4 as we have quoted it? We have been assisted in the examination of this question by very able arguments and briefs advanced by counsel on either side. Counsel agree that our constitutional provisions on the subject are unique, and an examination of the briefs convinces us that the cases in other states have not been directed to a consideration of similar language, either in constitutions or in statutes. A large portion of the argument in support of the statute has been addressed to three points: In the first place, a consideration of the policy of the statute, which is manifestly to afford a speedy and somewhat summary remedy for creditors of insolvent banks, and to enable the receiver, for their benefit, to promptly enforce all liabilities of stockholders. Secondly, the justness of this policy, the danger attending upon any process requiring securities to be immediately sold, often on a falling market and at a sacrifice, or, if that danger be avoided, the still greater danger of delaying resort to proceedings against stockholders until such a time that by their death or insolvency the remedies become ineffectual. Thirdly, an appeal to the general principle that the corporation, while it was a going

concern, had the right to make calls for unpaid subscriptions regardless of the sufficiency of its assets to pay existing liabilities, and that this right passed to the receiver, so that the receiver, in collecting unpaid subscriptions, is acting merely as he does in collecting other assets. We freely grant the correctness of the last statement as the statement of a general principle of law, and we further concede the correctness of the contention of the appellee as to the policy of the statute. We may further, for the purposes of this case, acquiesce in the position of counsel that for the effective winding up of insolvent banks and the protection of depositors a remedy against stockholders should be permitted in some cases, before, by a slow process of liquidation, other assets shall have been exhausted. But all these are matters not particularly pertinent to the question under consideration. We are not free to declare the law as we believe it ought to be. In a doubtful case of construction it may be proper to throw the balance in favor of that side where we conceive the natural justice and policy to lie; but this only for the reason that in such doubtful cases it is rather to be presumed that the intention of the law-makers was on the side of manifest justice and policy. Where, after resort to established canons of construction, no doubt is left, we must construe the law as written, and not in accordance merely with our own notions of abstract or substantial justice. Furthermore, in interpreting the written law the prevailing doctrine of other jurisdictions is of assistance only for the purpose of ascertaining upon what information the law-makers acted in adopting their language, and such general doctrine cannot be permitted to prevail as against a written constitution or statute plainly implying an intention to change the rule. In order to a proper comprehension of the constitutional provisions, some regard must be paid to the state of the law at the time the constitution was adopted. At that time a much-mooted question was whether, in case of insolvency, the liability for unpaid

subscriptions to stock rested solely on the original subscriber, or whether it passed to his transferee, and, in the latter case, whether the transferee's liability was sole or whether the original subscriber also remained liable. We conceive that one object of the adoption of section 4 already quoted was to remove this doubt, although the decisions had not then advanced so far, perhaps, as to enable a statement of the purpose to be made so clear as to entirely effectuate that object. There had also appeared at that time the so-called American or trust-fund theory with reference to corporate assets, especially capital stock. The controversy on this point had not then reached its present state of clear definition, but it had advanced so far that the framers of the constitution evidently intended, so far as their prescience extended, to remove doubt on that subject. Therefore, they provided that a liability to creditors should exist, but only after other assets should be exhausted and the amount of the claims ascertained. A motive undoubtedly prompting this solution of the problem was the fact that this was a new state, sparsely settled, its resources almost entirely undeveloped, and with very little home capital, and still less concentrated wealth in individuals, available for the purpose of developing such resources. It was, therefore, the policy adopted to encourage the investment and, to a certain extent, the concentration of capital for the purpose of developing the resources of the state; and, in view of the legal controversy then existing elsewhere, it can hardly be doubted that it was deemed in consonance with good policy to relieve persons engaging here in productive enterprises, so far as practicable, from unnecessary burdens and liabilities, and one method of doing so was by requiring the exhaustion of the assets of a corporation before calling upon subscribers for unpaid subscriptions to the capital stock. Whether this is now good policy, whether this provision should still be retained, are questions foreign to the issue. The constitution must be interpreted according to the facts which its framers and

the people in adopting it had then in mind. Even without resort to these extraneous circumstances, the language of section 4, in its general scope, cannot be open to much doubt. With them in view, its meaning is absolutely clear. The general purpose is to require, prior to the enforcement of liability for the unpaid subscriptions, the ascertainment of the debts of the corporation, and also the exhaustion of the corporate property other than such unpaid subscriptions; that is, the constitution contemplates, as a general thing, a resort to such other property of a corporation in the first instance to pay its debts, and a resort to unpaid subscriptions only for the purpose of supplying the deficiency after a judicial ascertainment of the amount of such deficiency, and only to that extent. The necessity of a prior judicial ascertainment of the corporate debts has been frequently asserted by this court. (*Commercial Nat. Bank of Omaha v. Gibson*, 37 Neb., 750; *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb., 175; *Farmers Loan & Trust Co. v. Funk*, 49 Neb., 353.) The other requirement, that the corporate property must first be exhausted, is no less mandatory and is implied and, indeed, expressed in the cases referred to. It is true that the language of these cases implies that the ascertainment of the debts must be by way of judgment against the corporation, and that the exhaustion of the assets must be evidenced by a return of *nulla bona* on execution upon such judgment. Whence it is argued that when proceedings in insolvency are instituted and the assets of the corporation impounded by means of a receivership, that method becomes impracticable or useless, and that, therefore, a resort thereto not being available, the constitutional requirement does not apply to such a case as this. But the court was in those cases considering the distinction between proceeding as general creditors against stockholders and proceeding as judgment creditors against stockholders of a corporation whose property could not be reached by execution. When a receiver has been appointed for the express purpose of

winding up an insolvent corporation, of ascertaining its debts, of liquidating its assets and applying the same to the satisfaction of those debts, a different question is presented. The allowance through regular procedure of a claim by the receiver may in such case take the place of a judgment. His report disclosing an exhaustion of the assets may take the place of the return of execution *nulla bona*. These questions are not now presented to us. We merely suggest them for the purpose of showing that the language used in the cases cited in regard to the necessity of a judgment and execution, while perfectly proper in the connection then used, is not necessarily controlling in a proceeding of this character. We are entirely clear that the general purpose of the constitutional provision was as already indicated, and that it was the deliberate intention of the framers of the constitution to render the liability for unpaid stock subscriptions, in one sense at least, secondary, to be enforced only after a consummation of the conditions precedent mentioned, and it is no answer to this conclusion to assert that the corporation itself, while it was a going concern, might by call, if necessary, followed by suit, have enforced that liability as primary. The conditions are different. The corporation in making calls acts for the stockholders. Directors or other officers authorized to make the call are representatives of the stockholders, by them selected for that and other purposes, and the object in making the call is to provide the corporation with means of proceeding with the business for which it was created. When, however, the corporation suspends its functions as a going concern, the only purpose of resorting to the capital is to discharge debts. It was perfectly competent for the constitution to provide that upon this contingency a liability which might theretofore have been enforced unconditionally by the representatives of the corporation should thereafter be enforced only as a secondary liability and so far as necessary to accomplish its purpose. This the constitution did, and in such clear terms as to be almost unmistakable.

It remains, therefore, to be considered only whether the present case is one of "claims against corporations" within the meaning of the constitutional provision. On the one hand, it is argued that the constitution refers only to direct actions by creditors against the stockholders. On the other, that the present proceeding is one on behalf of all creditors and, therefore, within the terms of the constitution. We think the latter view is correct. The receivership in this case was based solely upon allegations that the capital of the bank had become impaired, that the bank was insolvent, that it was conducting its business in an unsafe manner, and was jeopardizing the interest of its depositors. There were no allegations justifying the interference of a court of equity, except for the sole purpose of protecting the creditors of the bank. By the appointment of the receiver, the bank's assets passed into his possession for the purpose of paying creditors. By the statute, after that single object is accomplished, the remainder of the assets must be returned to the proper officers and the functions of the receiver and of the court cease. The ordinary remedies of the creditors were suspended by this action. The receiver, as an officer of the court, became entitled to pursue all remedies and collect the assets which were before that within reach of the creditors. In *Farmers Loan & Trust Co. v. Funk*, *supra*, we held that the receiver might pursue the stockholders on their liability for the benefit of creditors. We do not doubt the correctness of that decision, and it is here reaffirmed. Indeed, the liability of the stockholders in case of insolvency existing only for the purpose of paying the corporate debts, it is solely for the benefit of creditors and to satisfy their claims that proceedings to enforce that liability could be brought. If the actions ordered by the district court are not cases of claims against the corporation, they do not lie at all, because it is only to pay claims against the corporation that the liability exists.

It is suggested that the statute relates only to the remedy and for that reason it is not in conflict with the

constitution which relates to the liability and not the remedy. But this argument is founded on a misconstruction of the constitution. The constitution, in fixing the liability at the amount of the unpaid subscriptions, is only declaratory of the common law and of the contract of the subscribers. The new feature was affixing terms and conditions upon which, and upon which only, the liability could be enforced, and it was beyond the power of the legislature to provide a remedy whereby such liability could be enforced in violation of the terms impressed by the constitution.

We conclude that the portion of the banking act under which the order complained of was made is in conflict with section 4 of article 11 of the constitution relating to miscellaneous corporations, and is void. The report of the receiver showing affirmatively that the corporate property had not been exhausted, but only that it was in his opinion probably insufficient within a reasonable time to pay the liabilities of the bank, the court had no authority at that time to direct actions to be brought for the unpaid subscriptions.

REVERSED AND ORDER DISCHARGED.

CHARLES S. ROBERTS, APPELLANT, V. FRANK E. SAMSON
ET AL., APPELLEES.

FILED MARCH 3, 1897. No. 7118.

1. **Pleading: DEMURRER.** An objection in the nature of a general demurrer will not lie to a pleading sufficient in substance but wanting in form or completeness.
2. ———: ———. It is not a sufficient objection to a pleading when assailed by a general demurrer that it lacks definiteness of expression, or that the facts are therein stated in an argumentative form; but it will be *held* to charge what can by reasonable and fair intendment be implied from the statements thereof.

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3. **Mortgages: PAYMENT: PLEADING.** Answer examined, and held to charge a satisfaction of the mortgage debt, which, not being put in issue by the reply, must be taken as true.

APPEAL from the district court of Cuming county.
Heard below before NORRIS, J. *Affirmed.*

Tiffany & Vinsonhaler, Ferry & Small, and Dawes, Cof-froth & Cunningham, for appellant.

T. M. Franse, contra.

POST, C. J.

This was an action by Charles S. Roberts in the district court of Cuming county by which he sought to foreclose a certain real estate mortgage executed by Frank E. Samson and wife to the Lombard Investment Company for the principal sum of \$1,700 and interest from date, to-wit, February 28, 1890, at the rate of six and one-fourth per cent per annum, as evidenced by the bond and coupon notes of the said Frank E. Samson, and to which action the Valley Loan & Trust Company and Waldo E. Whitcomb were also joined as parties defendant. To the petition, which is in the usual form, Whitcomb answered, admitting the execution of the aforesaid bond and coupon by Samson, and alleging that J. T. Meyers, before whom, as county clerk of Cuming county, the said mortgage purports to have been acknowledged, was not in fact at the date of the certificate thereto, to-wit, March 1, 1890, the clerk of said county, and that said pretended acknowledgment is without authority and void, and that the said mortgage was accordingly not entitled to record in Cuming county. Another allegation of the answer to which especial prominence is given in the briefs of counsel is the following: "The defendant, for answer to paragraph eight of the petition, says: He admits that no proceedings at law have been had for the recovery of said debt, and denies that said debt has not been paid and denies each allegation of said paragraph except as specially admitted,

and avers the fact to be that heretofore, to-wit, on the 20th day of August, 1891, said negotiable real estate mortgage bond described in paragraph one of plaintiff's petition was fully paid and cancelled by the execution and delivery by the defendants Frank E. Samson and Harriet E. Samson to the Valley Loan & Trust Company of a quitclaim deed of the premises described in plaintiff's petition on condition and in consideration that said mortgage bond be cancelled and that the mortgage hereinafter declared upon be assumed and paid by the grantee named in said deed, which deed was duly recorded in the clerk's office of Cuming county, Nebraska, in book X of deeds on page 46, and was duly indexed and said grantee named in said deed went into immediate possession of said premises and have been, and are now, in the possession of said premises under said deed, and rent said premises and receive the rents and profits thereof and have neglected and refuse to pay the defendants' note and mortgage described in the following cross-petition:" Accompanying the foregoing answer is a cross-bill, in which is alleged the execution by the Samsons to Jacob Brememan, under date of March 1, 1890, of a mortgage upon the premises in controversy to secure the four notes of the mortgagors named in the sum of \$421.67 each, and the purchase in good faith by the answering defendant of said notes and mortgage without actual notice of the rights of the Lombard Investment Company, or its assigns, under and by virtue of the mortgage herein first described, with a prayer for foreclosure and for a decree adjudging said mortgage to have priority over the lien of the plaintiff's mortgage. There was also interposed a reply, in which it is first alleged that the officer who certified to the acknowledgment of the plaintiff's mortgage was, at the date in question, clerk of Thurston county, and that such certificate was in all respects in due and legal form to entitle the said mortgage to record in Cuming county; second, that Whitcomb, the answering defendant, should not be heard to allege any irregularity in the acknowledg-

ment of the plaintiff's mortgage for the reason that the mortgage to Brememan is, by its terms, made subject and subordinate to the lien in favor of the plaintiff's assignor, the Lombard Investment Company, and for the further reason that the rights of the said defendant were acquired subsequent to the commencement of this action and after the filing of a *lis pendens* notice of the plaintiff's claim in the premises. There is, however, in the reply, no allusion to the paragraph of the answer above set out, either by way of denial or avoidance. Upon the issues thus joined a hearing was had before the district court, resulting in a decree substantially as proved by the defendant Bigelow, adjudging his mortgage to be a first lien upon the premises in controversy, and from which an appeal has by the former been prosecuted to this court.

The first inquiry suggested by the argument is the sufficiency of the foregoing allegation as a plea of payment or accord and satisfaction. The answer is, it must be confessed, lacking in that degree of precision essential to a model pleading even under our liberal code system. But is it so deficient in substance as to be vulnerable when tested by means of a general demurrer? We think not. It is not enough, when a pleading is thus assailed, that the facts are imperfectly stated, that it lacks definiteness of expression or that the facts are argumentatively averred, but it will be held to charge what can be implied upon the statements therein by reasonable and fair intendment. (*Marie v. Garrison*, 83 N. Y., 14; *Rothburn v. Burlington & M. R. R. Co.*, 16 Neb., 441; *Tessier v. Reed*, 17 Neb., 105; *Forbes v. Petty*, 37 Neb., 899.) "Contrary to the common law rule," as said by Dixon, C. J., in *Morse v. Gilman*, 16 Wis., 504*, "Every reasonable intendment and presumption is to be made in favor of the pleading, and it will not be set aside on demurrer unless it be so fatally defective that, taking all the facts to be admitted, the court can say they furnished no cause of action whatever." While it is not in terms alleged that the contract relied upon was made with the holder of the first mort-

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gage, or through the Valley Loan & Trust Company as the authorized agent of such holder, it is expressly charged that the mortgage bond was fully paid and canceled in consideration of the conveyance by the Samsons of the mortgaged premises to said loan and trust company. The reasonable and necessary inference from that statement of the answer is that the consideration for the conveyance by the mortgagors was the promise of the holder of the bond and coupons instead of a stranger thereto. The paragraph quoted from the answer accordingly states a defense to the cause of action alleged, and which, not being put in issue by the reply, must be taken as true. It follows that the decree of the district court is right and must be

AFFIRMED.

EDWARD A. SMITH, APPELLEE, V. JOSIAH T. LONG ET AL.,
IMPLEADED WITH GEORGE W. E. DORSEY, APPELLANT.

FILED MARCH 3, 1897. No. 7129.

Mortgages: ASSIGNMENT: FRAUDULENT RELEASE: MORTGAGEE'S LIABILITY. The fraudulent release of a mortgage by the mortgagee after the indorsement without recourse of the bond and coupons, thereby secured, in favor of a third party having notice of the rights of the holder, does not of itself render the former liable in an action *ex contractu* for the amount of such debt.

'APPEAL from the district court of Cuming county.
Heard below before NORRIS, J. *Reversed*:'

E. F. Gray and D. B. Carey, for appellant.

H. C. Brome and Charles Offutt, contra.

POST, C. J.

This was an action by the appellee, Smith, in the district court for Cuming county, to foreclose a certain real

estate mortgage executed by C. H. Toncray and wife to George W. E. Dorsey, to which the Toncrays, Dorsey, the mortgagee, Josiah T. Long, Peter Nelson, Adrian Stevenson, Otto Baumann, as guardian for Adrian Stevenson, an infant, and R. C. Peters were made defendants. The petition recites the execution of the mortgage by Toncray and wife, covering 382 acres of land in Cuming county, to secure the bond of the former in the sum of \$3,500, bearing date of April 1, 1887, and maturing April 1, 1892, with interest at seven per cent, payable semi-annually, according to the tenor of ten coupon notes attached thereto for \$122.50 each; also the filing for record of said mortgage in Cuming county on the 30th day of April, 1887, and concluding as follows: "That on the 2d day of May, 1887, said defendant George W. E. Dorsey indorsed said bond as follows: 'Pay to the order of * * without recourse, George W. E. Dorsey,' and at the same time, by like words, indorsed each of said coupons, and thereupon sold and delivered the same, and all thereof, to this plaintiff, together with the said original mortgage. * * * That lately heretofore, to-wit, on the 11th day of October, 1890, and again on the 22d day of November, 1890, the said defendants George W. E. Dorsey and C. H. Toncray, unlawfully and fraudulently conspiring together to cheat and defraud this plaintiff and their co-defendants, Josiah T. Long, Peter Nelson, Otto Baumann, guardian of Adrian Stevenson, Adrian Stevenson, and R. C. Peters, did undertake to release the said mortgage and lien so as aforesaid acquired and held by this plaintiff, in manner and form as follows, to-wit, that is to say: That on October 11, 1890, the said George W. E. Dorsey, unlawfully, falsely, and fraudulently pretending that he, the said Dorsey, was still the owner of said mortgage, for the alleged consideration of \$1,000 did undertake to execute to his co-defendant, C. H. Toncray, and his wife, Emma R. Toncray, a release of the said mortgage held by this plaintiff, on the * * * and in like manner did, on November 22, 1890, illegally, falsely, and fraudu-

lently pretending that he was the owner of said mortgage, for the purported consideration of \$500, undertake to release to his co-defendant and his wife, Emma R. Toncray, the said mortgage then owned and held by this plaintiff on the * * * but the same, and both thereof, were fraudulent, null, and void, for inasmuch as at that time this plaintiff, for valuable consideration, as the said Dorsey and Toncray well knew, was the owner and holder of the said mortgage so as aforesaid executed by the said Toncray to said Dorsey on April 1, 1887, for \$3,500, and the said Dorsey, as he then well knew, had no interest in or right or title to said mortgage, or any part thereof, and his, the said Dorsey's, pretense that he had the right to release the same was, as he, the said Dorsey, well knew, a fraud upon his co-defendants, the said Josiah T. Long, Peter Nelson, Otto Baumann, guardian of Adrian Stevenson, Adrian Stevenson, and R. C. Peters, and the said alleged release of October 11, 1890, for the recited consideration of \$1,000, was illegal, null, and void, for inasmuch as the same, even though the said Dorsey had had the right to execute it, was not acknowledged in manner and form as required by law, nor duly witnessed, the said C. H. Toncray himself, the grantee, and no other person, being the notary public before whom the same purported to be executed, and the said release of November 22, 1890, for the purported consideration of \$500, was not executed by the said Dorsey in the presence of a disinterested notary public, and was not attested or certified as required by law, and neither of said releases were entitled to be recorded. And further, this plaintiff says that the said defendants, Josiah T. Long, Peter Nelson, Otto Baumann, guardian of Adrian Stevenson, Adrian Stevenson, and R. C. Peters, and each and all of them, acquired their interest, if any they had, in said premises negligently and carelessly, and without any regard for the rights of this plaintiff, and well knowing that this plaintiff's said mortgage was not due, still of record, unreleased, and unpaid." The prayer is for a decree of

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foreclosure, that the plaintiff's mortgage may be adjudged to be a first lien upon the premises therein described, and for a deficiency judgment against the aforesaid maker and indorser of the mortgage bond. To said petition Dorsey interposed a general demurrer, which was overruled, and the cause proceeded to decree adjudging the releases above mentioned to be in all respects valid, and to operate as a discharge of so much of the mortgaged property as is therein described. The court also apportioned the mortgage debt between the property thus released and the portion thereof which, according to said decree, is still subject to the lien, and rendered personal judgment against Dorsey in the sum of \$2,033.49, from which the latter alone appeals.

Practically the only proposition argued at this time is that the petition fails to state a cause of action against Dorsey, the appellant, for the reasons, as alleged therein, that the bond and coupons were indorsed without recourse, and that the rights of the other defendants, if any, were acquired with knowledge that the plaintiff's said mortgage was still of record, unmatured, unreleased, and unsatisfied. The only purpose of the plaintiff in joining Dorsey as a party defendant was, as we have seen, to secure against him a deficiency judgment, or, in other words, to charge him with the amount of the mortgage debt. It is to be regretted that the plaintiff has failed to submit a brief upon this appeal, or to indicate the ground of Dorsey's alleged liability for the mortgage debt. If the plaintiff's security has been destroyed or impaired through the fraudulent act of the mortgagee named, the latter would, as a matter of course, be liable for damage in an action *ex delicto*, or possibly upon an accounting therefor in this proceeding. The petition is, however, not silent merely respecting the damage, if any, resulting from the attempted release by Dorsey of portions of the mortgaged property, but it appears affirmatively therefrom that the plaintiff's security is in nowise affected, since, as expressly charged, the other defend-

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ants, whether as purchasers or mortgagees, were fully advised of his (plaintiff's) rights in the premises, and their interests therein, of whatever nature, are in law subordinate to the lien of his mortgage. Nor can the petition be said to state a cause of action for nominal damage, since, as appears therefrom, the purpose of the action is not to recover such damages as result directly from the tort alleged, but to charge the appellant as a party to the mortgage debt. The decree is reversed and the cause remanded, with instructions to sustain the appellant's demurrer, and for further action not inconsistent with this opinion.

REVERSED.

COUNCIL BLUFFS SAVINGS BANK V. HENRY W. GRISWOLD,
TRUSTEE, ET AL.

FILED MARCH 3, 1897. No. 7021.

1. **Parties: NON-JOINDER.** It is in case of joint obligations only that all persons liable thereon must be joined as parties defendant. An action may be prosecuted to judgment against any one or more of several persons jointly and severally bound without joining others liable for the same indebtedness.
2. **Abatement: PENDING SUIT: EVIDENCE.** A plea of another suit pending is not sustained by proof of an order dismissing, without prejudice, a former suit on the same cause of action, and the filing by the plaintiff of a motion for a new trial upon which, so far as the record discloses, no action has been taken by the trial court.
3. **Courts: LAWS AND PROCEDURE IN OTHER STATES.** The laws of sister states will, as a rule, in the absence of proof, be presumed to be the same as our own. There are, however, to that rule recognized exceptions, among which is that courts of general jurisdiction of other states will, unless there is proof to the contrary, be presumed to possess the authority they assume to exercise, and that the methods of procedure pursued by them, although differing from the established practice of this state, are authorized by the laws of the state in which they act.
4. **Judgments: JOINT AND SEVERAL OBLIGATIONS: APPEARANCE.** Where to an action upon a joint and several obligation all parties liable thereon are made defendants, the fact that the judgment

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therein rendered is void as to one of such defendants, the voluntary appearance in his name being unauthorized, does not render said judgment void as to all.

5. **Judgments: LIEN UPON PARTICULAR PROPERTY: RELEASE OF LIEN.** A judgment defendant cannot, as a matter of right, unaffected by equitable considerations, insist upon the preservation of the judgment lien upon particular property of his co-defendants, nor will the release by the plaintiff of specific property of one of several judgment defendants from the lien of the judgment, of itself, operate to discharge the other defendants from liability therefor.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J. *Reversed.*

McCabe, Wood & Elmer and Cavanagh, Thomas & McGilton, for plaintiff in error.

Edgar H. Scott, Schomp & Corson, A. S. Churchill, and C. E. Herring, contra.

POST, C. J.

This was an action in the district court for Douglas county upon a decree of the district court within and for Pottawattamie county and state of Iowa, which resulted in a final judgment in favor of the defendants below, and from which the plaintiff prosecutes error to this court.

The action in the Iowa court was by the plaintiff herein against Henry W. Griswold, as trustee and in his own right, also against Julius C. Iler, Claus J. Schmidt, H. E. Gales, Mary E. Fried, O. P. McKesson, H. P. Stoddart, and M. F. Williams, for the foreclosure of a certain mortgage executed by Griswold as trustee, and resulting in a decree awarding to I. S. Wright, who had intervened therein, a first lien upon the mortgaged property for \$2,325, and in favor of the plaintiff a second lien thereon, for a like amount. There was a further finding, to the effect that the several defendants above named were personally liable for the amounts thus adjudged due, accompanied by an order for the sale of the mortgaged premises upon special execution, and for a general exe-

cution against said defendants for any balance thereon remaining unsatisfied by the proceeds of such sale. Said property was thereafter sold as provided by the decree, and the proceeds thereof, to-wit, \$2,465.64, applied in satisfaction of the first lien and costs, leaving nothing to apply on the plaintiff's judgment. We shall in our discussion of the questions presented adopt the admirable arrangement thereof in separate brief of counsel for the defendant Gates.

It is first argued that there is a defect of parties, since Henry W. Griswold, against whom, in his own right, judgment was rendered by the Iowa court, was not joined herein as a defendant. It is doubtful, indeed, if that objection is presented by the record, but assuming the omission of the party named to have been properly pleaded, the alleged defect will not avail the defendants in this action, since by statute of Iowa all persons bound by a judgment or decree rendered in that state are both jointly and severally liable thereon. Section 2550, Annotated Code of that state, which was introduced in evidence, reads as follows: "Where two or more persons are bound by contract or by judgment, decree, or statute, whether jointly only or jointly and severally, or severally only, and including the parties to negotiable paper, common orders, and checks, and sureties on the same, or separate instruments, or by any liability growing out of the same, the action thereon may, at the plaintiff's option, be brought against any or all of them. When any of those so bound are dead, the action may be brought against any or all of the survivors, with any or all of the representatives of the decedents, or against any or all such representatives. An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the others." The evident purpose of the statute above quoted is to abolish the joint liability of persons bound by contract, judgment, or statute, and to authorize the prosecution of actions against any or all of the parties so liable, at the election of the

plaintiff. (*Ryerson v. Hendrie*, 22 Ia., 481; *Hosmer v. Burke*, 26 Ia., 356; *Allen v. Maddox*, 40 Ia., 125.) Griswold was accordingly not a necessary party, and the contention of the defendants, so far as it relates to this branch of the case, is without merit.

2. It is alleged in the separate answer of Gates, and perhaps others of the defendants, that there is another suit pending between the parties hereto upon the same cause of action. The foundation for that contention is the fact that the plaintiff herein, in the year 1889, commenced an action in the district court for Douglas county upon the judgment here involved, which was, upon a trial to the court without the assistance of a jury, determined in favor of Mary A. Fried, one of the defendants therein, on the ground that the appearance in her name in the Iowa court was unauthorized, and that the judgment was as to her void for want of jurisdiction. There was also a final order dismissing said cause as to the other defendants, without prejudice to another action. To the order last mentioned the plaintiff excepted and in due time filed a motion for a new trial, which has, so far as this record discloses, never been submitted to the court for its determination. The motion for a new trial did not of itself operate to suspend the judgment or in any way impair its force or conclusiveness as a determination of the issues involved. Execution will in such case be awarded upon the demand of the successful party for his costs, and in case of an equitable proceeding an appeal may be prosecuted therefrom to this court. (*Parr v. Van Horne*, 40 Ill., 122; *Church v. Goodin*, 22 Kan., 527; *People, ex rel., v. Loucks*, 28 Cal., 68.) The former action is not, therefore, in a legal sense, now pending, and the objection on that ground may be dismissed without further consideration.

3. It is next contended that the plaintiff's remedy is by means of a supplemental proceeding for a deficiency judgment in the Iowa court. This contention is based upon the statutes and recognized practice in the courts

of this state. The laws of Iowa are, it is argued, the record being silent upon the subject, presumed to be the same as our own; hence, as counsel conclude, the court was without authority in the first instance to enter personal judgment against the defendants. It is undoubtedly true, as a general proposition, that the laws of a sister state will, in the absence of proof, be presumed to be the same as those in force in this state; but to that rule there are recognized exceptions, of which the facts of this case afford an excellent illustration. It will, upon reason and authority, be presumed, in the absence of proof to the contrary, that courts of general jurisdiction of other states possess the authority they assume to exercise, and that the methods of procedure pursued by them, although differing from the established practice in this state, are authorized by the laws of the states in which they act. (*Dodge v. Coffin*, 15 Kan., 277; *Ward v. Baker*, 16 Kan., 31; *Sanford v. Sanford*, 28 Conn., 6; Black, Judgments, sec. 889; Freeman, Judgments [4th ed.], sec. 565.) But it is unnecessary to indulge in presumptions in order to sustain the adjudication of the Iowa court, since it is clear that an action would in this state lie upon the record introduced in evidence as a domestic judgment. (*Stover v. Tompkins*, 34 Neb., 465; *Eldredge v. Aultman, Miller & Co.*, 35 Neb., 884.)

4. It is claimed that the judgment which is the basis of this action, having been determined in the former suit to be void for want of jurisdiction so far as it concerns Mary A. Fried, one of the defendants named therein, is void as to all of the defendants. That claim rests upon the assumption to which we have already alluded, viz., that the judgment in question is the joint obligation only of the several defendants. But the mortgage debt was, as we have seen, the joint and several obligation of the parties thereto, and that the plaintiff might, at its election, have pursued its remedy by means of personal judgment against any or all of such parties. Had Mrs. Fried not been made a party to the foreclosure proceedings

and the cause prosecuted to judgment against these defendants, the latter would, in view of the statute quoted, have had no ground of complaint. Again, had the appearance in Mrs. Fried's name been authorized, and the judgment against her in all respects regular and binding, an action would lie thereon against her alone, or against one or all of the other defendants in her absence. And since it was the plaintiff's privilege to proceed against any or all persons liable for the mortgage debt, the unauthorized appearance for one party named as a defendant cannot on principle be said to render the judgment void as to others regularly served with process, or who voluntarily submitted themselves to the jurisdiction of the court.

5. Finally, it is alleged by the defendants Gates and Schmidt, and urged by way of argument, that the effect of the release by plaintiff from the operation of the judgment of certain property in Pottawattamie county was to satisfy said judgment and discharge said defendants from liability therefor. The facts relied upon to support that claim, briefly stated, are as follows: The plaintiff, by its cashier, executed certain written orders, directed to the clerk of the district court, substantially similar in form, one of which is here set out:

COUNCIL BLUFFS, IA., February 27, 1890.

"*H. J. Chambers, Dist. Court, Potta. Co., Ia.*—DEAR SIR: Please release lots 5, 6, and 7, block 17, Mill Addition to Council Bluffs, from lien of a judgment of \$2,442.25 in favor of the Council Bluffs Savings Bank, as appear in judgment docket 7, page 172.

"By order of COUNCIL BLUFFS SAVINGS BANK,

"By A. W. REIKMAN, *Cashier.*"

These orders, it is conceded, refer to the judgment involved in this action, and in obedience thereto formal entries were made by the clerk releasing the property therein described from the judgment lien. There is, it should be observed, no pretense that the property thus

released was included in the mortgage, or that the plaintiff had any specific lien thereon as security for the indebtedness which is the foundation of the judgment. It does not appear that the plaintiff received any consideration whatever for the releases alleged, nor is it shown by pleadings or proof that the property described was at the time of its release owned by the non-complaining defendants, who are by counsel referred to as "the Council Bluffs parties," or that said defendants, or any of them, are insolvent or unable to contribute their just proportion of the judgment indebtedness. The question is not, therefore, that of an alleged payment, relied upon as a defense in full or *pro tanto*, or the power of courts of equity to control the enforcement of judgments in order to administer equity between the several parties liable therefor, but whether one defendant may, as a matter of right, unaffected by equitable considerations, insist upon the preservation of the judgment lien upon particular property of his co-defendants. The contention of defendants must fail for the obvious reason that the law will not require resort to particular property for the satisfaction of a judgment. Indeed, courts of law have, as a rule, nothing to do with the way in which their judgments are enforced or the funds from which they are satisfied; they merely pronounce the sentence of the law upon the facts before them, to which, as an incident thereof, a lien attaches by virtue of statute. (Black, Judgments, sec. 402.) But it is needless to cite authority in support of a proposition which may be demonstrated by an illustration. The plaintiff in this case might, without prejudice to a subsequent proceeding for its enforcement, have suffered the judgment to become dormant, thereby discharging the lien as to all property owned by Council Bluffs defendants, and we are unwilling to hold that it was unable to do directly that which it could, as all admit, accomplish by indirection.

The reasons which controlled the district court in its findings and judgment for the defendants do not clearly

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appear, but since the record presents questions of law only, which as we have seen, must be resolved in favor of the plaintiff, it follows that the judgment must be reversed and the cause remanded for trial *de novo*.

REVERSED.

FRANK B. GILMORE V. G. H. WHITEMAN ET AL.

FILED MARCH 3, 1897. No. 7049.

Res Judicata: ACTION ON ONE OF A SERIES OF NOTES. Where to an action upon the first of a series of notes given for the same consideration the defendant alleges fraud and breach of warranty for the purpose of avoiding the contract in question, a verdict and judgment for the plaintiff may be pleaded as a bar to the same defense when interposed to an action upon a second note of the same series.

ERROR from the district court of Dawson county. Tried below before HOLCOMB, J. *Reversed*.

E. A. Cook, for plaintiff in error.

Warrington & Stewart, *contra*.

POST, C. J.

This was an action below in the district court for Dawson county upon a note for \$650 executed by the defendants in error to W. J. Simmons and J. M. McIntosh, bearing date of October 22, 1888, payable thirty months after date, with interest at eight per cent, payable semi-annually. Defendants answered admitting the execution of the note sued on, but alleging that the same was given in part payment for a certain stallion purchased of the said Simmons and McIntosh upon the following written warranty:

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"OVERTON, NEBRASKA, October 22, 1888.

"For and in consideration of the sum of thirteen hundred dollars, paid by one note of \$650, due eighteen months after date, and one of equal amount due thirty months after date, at eight per cent interest, we bargain, sell, and deliver, and have sold and delivered one registered, finely bred English shire horse called 'Mistake' to Lot G. Carr, G. H. Whiteman, and Abbie P. Lincoln, equal owners, of Overton, Nebraska, and we warrant said horse to be a foal-getter if properly cared for.

"W. J. SIMMONS.

"J. M. MCINTOSH."

It was further alleged that the said Simmons and McIntosh, in order to induce defendants to purchase the said stallion and execute the said note, exhibited to them a false and fictitious pedigree by which said stallion was represented to be a purely bred English shire horse, and that the defendants being inexperienced in like matters purchased the said stallion and executed the said note, relying upon said statements and warranties; whereas in truth and in fact said stallion was not a purely bred English shire horse; that he "was not a registered and pedigreed animal," and was not a foal-getter, but was, as the said Simmons and McIntosh well knew, of no value whatever. To the foregoing answer the plaintiff replied as follows: "That the plaintiff, on the 4th day of March, 1892, filed his petition in the district court (said cause before that having been appealed from the county court of Dawson county) against the defendants, who were the same defendants as in this action, said suit being upon said promissory note for six hundred fifty dollars (\$650) so given at the time the note in suit was given and which matured eighteen (18) months after its date. In said action the plaintiff herein was plaintiff and the defendants herein were defendants; that to said petition the defendants herein filed their amended answer on the 4th day of March, 1892, in which said answer the defendants in said action, they being the same defendants as in this action,

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set up and pleaded the same defense to said promissory note as is set up by said defendants in paragraphs 4, 5, and 6 of the amended answer in this case; that on the issue joined in said first action a trial was had to the court and jury at the October, 1892, term of the district court within and for Dawson county; that the jury in said cause returned a verdict therein and said court, at the January sitting thereof, having overruled the motions for a new trial, judgment was by said court entered on said verdict in favor of the plaintiff herein against the defendants herein, said parties herein being plaintiff and defendants in said action, for the sum of three hundred fifty-eight dollars (\$358) and costs of suit; that said judgment is in full force and unreversed; that the defense set up in said cause wherein said judgment was so rendered in favor of this plaintiff and against the defendants herein is the same defense and grows out of the same transaction and is between the same parties as is the defense set up in the amended answer in this case," etc. Upon the trial of the issues thus joined the plaintiff offered in evidence the petition, answer, and reply in the suit upon the companion note, the defense interposed therein being identical with that alleged in this action, as to the record of the trial of said cause showing a verdict and judgment therein in plaintiff's favor in the sum of \$358, but which were, upon the objection of the defendants, excluded, and which is the ruling relied upon for a reversal of the judgment in this cause.

The objection to the evidence offered was based upon the following grounds: (1.) No such issue was presented in the county court where the cause originated and from whence it was appealed to the district court. (2.) Said evidence is irrelevant and immaterial. (3.) The issues in this cause are not identical with those tried in the former suit. (4.) The judgment mentioned in the record offered in evidence was, by means of a petition in error, removed to this court and is still pending and undetermined herein. There is, so far as we can discover from the record and

briefs of counsel, no foundation whatever for the first and fourth grounds of objection. Our examination will, accordingly, be confined to the single proposition stated in the second and third grounds thereof, viz., that the issues tried in the former suit are not identical with those tendered by the answer in this action, and that the judgment therein cannot be here interposed as an estoppel. Or, to state the same proposition in the form of an interrogatory, are the allegations of the reply sufficient as an avoidance of the new matter alleged in the answer? It is an elementary rule often recognized in this state that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in a subsequent action between the same parties and others in privity with them. (*Wilch v. Phelps*, 16 Neb., 515; *Nelson v. Bevins*, 19 Neb., 715; *Knorr v. Peerless Reaper Co.*, 23 Neb., 636; *Gayer v. Parker*, 24 Neb., 643.) The reply must, when tested by that rule, be held sufficient, and the judgment therein alleged conclusive of the question raised by the answer. There can, upon the record before us be no doubt of the identity of the defense here interposed with that alleged in the former action and which was in part sustained by the judgment therein. That action was, as we have seen, upon a note executed at the same time as the one here involved, and as part consideration for the stallion described in the answer. The contract of warranty and the fraud there interposed as a defense are the same as those relied upon in this action. By the judgment pleaded two facts are conclusively established: First, that the stallion purchased by the defendants was not as represented by Simmons and McIntosh, a sure foal-getter; second, that the defendants' damage on account of such misrepresentations, whether resulting from a breach of the contract of warranty, or for actionable fraud, did not exceed the sum of \$500, being the difference between the face value of the note there involved and the amount of the verdict and judgment for the plaintiff. If authority were necessary to prove that

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the judgment pleaded is, in view of the facts alleged, a complete bar to the same defense when interposed in this action, it is found in *Knorr v. Peerless Reaper Co.*, *supra*, a case in point. (See, also, 2 Black, Judgments, sec. 754, and cases cited.) It follows that the rejection of the evidence offered was error, for which the judgment in favor of defendants must be reversed and the cause remanded for further proceedings in the district court.

REVERSED.

GEORGE OBERNE ET AL. V. GEORGE BURKE ET AL.

FILED MARCH 3, 1897. No. 7134.

1. **Principal and Agent: RATIFICATION: EVIDENCE.** A ratification by a principal of the unauthorized act of his agent may be inferred from the conduct of the former inconsistent with any intention other than a purpose to adopt such act as his own.
2. ———: ———: ———. *Held*, From an examination of the evidence, (1) that the contract sued on, pledging defendants' credit, is within the scope of the authority of their agent by whom it was executed; (2) granting such contract to have been unauthorized and void when executed, the jury were warranted in finding that it has been subsequently ratified by the defendants.

ERROR from the district court of Douglas county.
Tried below before HOPEWELL, J. *Affirmed*.

Montgomery, Charlton & Hall, for plaintiffs in error.

Hall, McCulloch & Clarkson, *contra*.

POST, C. J.

This is a proceeding prosecuted by the plaintiffs in error, hereafter called the defendants, to reverse a judgment of the district court for Douglas county based upon the following instrument:

"SOUTH OMAHA, NEB., April 26, 1897.

"*M. Burke & Sons, U. S. Yards, Neb.*—DEAR SIR: We will guaranty the payment by R. Kunath in thirty days the sum of seven hundred ninety-one and 28-100 dollars for seventeen head of cattle.

"OBERNE, HOSICK & Co.,

"Per HARMON."

By the answer interposed below every allegation of the petition is put in issue; however, the only substantial controversy relates to the authority of Harmon, who signed the foregoing agreement, to bind the defendants by contracts of like nature executed in their name. A former judgment in favor of the plaintiffs below was reversed by this court on the ground that the contract sued on was not shown to be within the scope of the authority of the agent by whom it was executed, or that it had been subsequently ratified by the defendants. (See *Oberne v. Burke*, 30 Neb., 581.) In addition to the facts stated in the opinion cited there was, on the second trial, evidence tending to prove that one Bush, who had the general charge and supervision of the defendants' business at Omaha, was absent from the state for the period of a month or more immediately preceding May 1, 1887, and that the said Harmon was, with the knowledge and approval of defendants, left in charge of their said business during his absence. There is, it is true, a suggestion to the effect that Harmon was a mere subagent of Bush, and that, granting the power of the latter to bind defendants by contracts like that here involved, such authority implies the exercise of a personal judgment and discretion which cannot, without the consent of the principal, be delegated to another. But there was evidence which warranted the jury in finding that Harmon was not a mere subagent; that he was, on the contrary, the accredited representative of the defendants, and clothed with whatever authority was possessed by Bush in the conduct and management of the business at Omaha. It was also shown by the testimony of Bush that he returned to Omaha about May 1, or five

days subsequent of the agreement above set out; and Mr. Hosick, one of the defendants, being asked when his firm first learned of said agreement, answered, "Mr. Bush wrote us about it on his return home." It does not appear that notice was given by defendants of the repudiation of the agreement in their name until maturity of the debt thereby assumed, while one of the plaintiffs, George Burke, testified that no communication whatever was received from defendants relating to said agreement until after default by Kunath, and dishonor of the draft drawn upon defendants in accordance with the terms of their guaranty; and the same witness, referring to the course of dealing with defendants, testified, in substance, that previous to the refusal of payment in this instance Bush's authority to pledge the credit of defendants' firm under like circumstances, although frequently exercised, had never been disputed. It may also be said to have been the practice of Bush, in the management of defendants' business, and in their name, to guaranty payment in favor of commission men for cattle sold to butchers with whom said firm had dealings, the purpose of such accommodations being to enlarge the firm's business in Omaha and vicinity. The evidence shows also that all previous guaranties were kept good, and in closing up several of such transactions drafts were drawn upon the defendants in their firm name and which were paid by the firm's checks. It was customary for one of defendants to visit Omaha as often as once in six months and on such occasions to examine into the condition of the firm's business, by ascertaining the amount of cash on hand, and in bank, and inspecting checks drawn against its bank account. The canceled checks drawn in payment of bills thus guarantied by Bush were, it is fair to presume, submitted to the scrutiny of the defendants and were sufficient of themselves to put the latter upon inquiry touching the course of dealings in their name. The evidence is, we think, quite sufficient to sustain the finding that defendants were advised of Bush's practice to

guaranty payment in behalf of patrons of the firm in Omaha and vicinity, and that such practice was within the scope of the authority of said Bush as the defendants' managing agent.

We are also of the opinion that a ratification of Harmon's act in pledging defendants' credit may be implied from the facts and circumstances in evidence. In addition to the failure, above commented on, to give notice of the repudiation of the alleged unauthorized agreement until after default by Kunath, the party primarily liable to plaintiffs, it is conclusively shown that defendants at the time in question held a chattel mortgage upon his, Kunath's, butcher shop, tools, and fixtures for \$1,500, of which amount \$1,075 represented an indebtedness previously assumed by defendants for the mortgagor, and the balance, \$425, was to secure future advancements of money or cattle by defendants. It is also established beyond controversy that Bush, upon being notified of the guaranty by Harmon in defendants' name, and before maturity of the debt which was the subject of that contract, induced Kunath to surrender to him the property covered by said mortgage, and which was by agreement disposed of at private sale on defendants' account. Kunath, who was called as a witness for plaintiffs, testified, in referring to the foreclosure of the mortgage, as follows:

Q. When you turned over all the property under that mortgage, did the amount you owed him at that time, and for which the mortgage was taken, include the \$791 for these cattle? [Referring to the indebtedness mentioned in the contract of guaranty.]

A. Yes, sir. * * *

Q. At the time Oberne, Hosick & Co. took your property under this mortgage, about what amount were you owing them outside of this \$791?

A. In the neighborhood of \$400.

The foregoing statement, so far as it relates to the application to be made of the proceeds of the mortgaged property, is not expressly contradicted by Bush, who tes-

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tified in behalf of defendants. It is not seriously contended that the act of Bush in accepting the mortgage here mentioned, or the subsequent foreclosure thereof in the name of the defendants, was in excess of his authority as managing agent of the latter. A review of the authorities bearing upon the proposition here involved would be a profitless task. It is sufficient that a ratification will be implied from the conduct of the person in whose behalf another has assumed to act, clearly inconsistent with any intention other than a purpose to adopt such act as his own. (Mechem, Agency, sec. 146 *et seq.*; 1 Am. & Eng. Ency. of Law [2d ed.], 1195; *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb., 68; *Farmers & Merchants Bank of Elk Creek v. Farmers & Merchants Nat. Bank of Auburn*, 49 Neb., 378.) Granting, therefore, that the contract sued on was in the first instance unauthorized and void, the jury were warranted in finding that it has been subsequently ratified by the defendants, such being the reasonable and logical, if not, indeed, the necessary, inference from defendants' conduct as shown by the evidence above cited.

There are other assignments presented by the arguments of counsel, but which, in view of the conclusion above stated, do not call for notice at this time. There being no error in the record, the judgment is

AFFIRMED.

HENRY N. TOWN V. MISSOURI PACIFIC RAILWAY COMPANY.

FILED MARCH 3, 1897. No. 7054.

1. **Water-Courses: SIZE OF STREAM.** To constitute a water-course the size of the stream is not material. It must, however, be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous. *Pyle v. Richards*, 17 Neb., 180, approved and followed.

2. **Surface Water: RIGHTS OF LAND OWNER.** The doctrine of the common law in regard to surface waters is as a general rule in force and controls in this state. Surface waters may be controlled by the owner of the land on which they fall or originate or over which they flow. He may appropriate to his own use all that falls or comes on his land and refuse to receive any that falls or originates or flows on or over adjoining property.
3. ———: ———. The right under the general rule to control surface waters must be so exercised by any person as not to unnecessarily or negligently cause injury to the rights and property of others.
4. ———: ———: **EMBANKMENTS.** Surface waters may have such an accustomed flow as to have formed at a certain place a channel or course, cut in the soil by the action of the water, with well-defined banks, and having many of the distinctive attributes of a water-course; and though there are no exceptions to the general rule except from necessity, this may constitute an exception, and if the flow is stopped by the erection of an embankment across and in the channel, some provision may be necessary for the allowance of the regular flow of the surface waters.
5. ———: ———: ———: **NEGLIGENCE.** Whether such embankment has been negligently constructed with reference to the obstruction of the flow of the surface waters, and whether such negligence, if any, is the proximate cause of an alleged injury, are generally questions to be submitted to the jury.
6. ———: **OBSTRUCTION: NEGLIGENCE.** *Held*, That a finding that the damages in this case were not the result of negligence on the part of defendant was sustained by the evidence.
7. **Instructions: ASSIGNMENTS OF ERROR.** If instructions are grouped in an assignment of error the determination that the action of the trial court, the subject of complaint, was proper as to one of such instructions suffices to dispose of the entire assignment.
8. **Special Findings: FAILURE TO REQUEST: REVIEW.** Where a jury is directed to find upon particular questions of fact, if any further than those submitted are desired by a party to the action, a request must be made for the submission of the further questions. If no request is made, error cannot be predicated upon the failure of the court to include such questions in the list of those directed to be answered.
9. ———: **IMMATERIAL ANSWERS: GENERAL VERDICT: JUDGMENT.** Where questions for special findings are submitted to a jury the answers to which would be immaterial to the issues as presented by the pleadings and evidence, and in view of the other findings of the jury, and the jury fails to answer one or more of such questions, it is not prejudicial error for the court to render a judgment over the objection of a party, on the general verdict returned.
10. **Verdicts.** The general and special verdicts held not inconsistent.

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ERROR from the district court of Lancaster county.
Tried below before STRODE, J. *Affirmed.*

Samuel J. Tuttle, for plaintiff in error.

A. R. Talbot, *contra.*

HARRISON, J.

This is an action by the plaintiff in error, also plaintiff in the lower court, to recover of the defendant railway company the damages alleged to have been caused by the obstruction of a water-course by the careless and negligent construction and maintenance of an embankment by the railway company on its right of way and the consequent flooding of the plaintiff's premises or place of business in the city of Lincoln, and injury to the articles which he kept therein for sale. The defendant company, in its answer, denies any negligence on its part in the particulars complained of in the petition, and alleged that the damages, if any, suffered by the plaintiff were the result of his own negligence, and further pleaded as follows: "Defendant further answering says that the drainage provided for under the road-bed and embankment complained of in plaintiff's petition was, and has been at all times, sufficient to successfully and completely drain the country and property tributary thereto, and that if any damage or injury accrued to the plaintiff's property, as set forth in his petition, it was due to unusual and unprecedented heavy rains and to surface water and by reason of the physical condition of the property and ground not owned or controlled by the defendant on the north side of said embankment and railway track, which prevented said water from escaping, and that the outlet and sewer provided for the escape of such surface water by the city of Lincoln on said north side was insufficient and out of order and practically destroyed so that the said surface water could not escape; that over which said sewer and drain and conditions and

outlet the defendant railway company had no control or authority whatever, and that the backing up of the water complained of in the plaintiff's petition was due to the carelessness and negligence of the city of Lincoln, if any, and not to the defendant company. Defendant further answering says that the embankment complained of in plaintiff's petition does not cross a natural stream or water course." A reply,—a general denial of the new matter contained in the answer,—was filed, and on trial to the court and a jury the defendant was successful and secured a verdict, on and in accordance with which judgment was subsequently rendered, and the plaintiff presents the case here for review.

It appears that on and prior to the 10th of June, and during some considerable time subsequent thereto, the plaintiff was conducting mainly what is commonly known as a "feed store" in a building on the corner of Twenty-seventh and W streets in the city of Lincoln, in which, on the said 10th of June, he had a stock or supply consisting of bran, shorts, hay, corn, oats, chopped feed, etc. He also had for sale some flour and corn meal. A body of land, the plaintiff says about a section (640 acres), one witness says a half section, and others fix it at two or three hundred acres, within the corporate limits of the city of Lincoln, including some of the improved portions of the city, and all platted or laid out in lots and blocks, etc., on a lot on which was the plaintiff's place of business, has such a surface conformation or is sloped so that, in time of rains or melting snows, any running waters caused thereby flow toward and come together in a body at a place in what witnesses called a "draw," others a "depression in the prairie," and others a "channel" or "water way," having its course near the store of plaintiff, and in, or directly across which, an embankment was made by or for the railway company, and which stopped the flowage of waters in the channel. The company made a culvert by placing at the base of the embankment, in the course which the surface waters had

apparently taken in their flow, a tile of the required length, and of an internal diameter of twenty-four inches. On the date stated in plaintiff's petition there was a very heavy rainfall, and the consequent flow of the surface waters draining from the body of land or portion of the city we have hereinbefore indicated came in what plaintiff contends was their regular and natural channel or well-defined course, and, when they reached the embankment were, he asserts, by reason of the construction of such embankment, and the lack of a proper culvert or opening in the embankment for the waters to run in their natural and usual direction, and pass through in sufficient volume or quantity, thrown back and into the plaintiff's store.

The jury, pursuant to directions given it before retirement to consider of a verdict, made special findings of which we desire to direct attention to the following:

"1. Was the water alleged to have been backed up and occasioned the damage, because of the building of defendant's embankment in a natural or general water-course?

"A. In freshets; yes.

"2. Was the water alleged to have caused the injury in this case surface water caused by heavy rains?

"A. Yes.

"3. Did the depression in the land complained of have a water-course or natural channel with banks and clearly defined water-course?

"A. Yes.

"9. Was the water complained of by plaintiff surface water?

"A. Yes.

"10. Was there a natural water-course crossed by the embankment complained of?

"A. In freshets; yes."

These established that the jury believed from the evidence that there was at the place where the embankment was built a well-defined channel or course for drainage of deposits or accumulations of rains or melting snows, of

surface waters, and none others. There was sufficient evidence in the record to support these findings, though there was much testimony tending to lead to a contrary conclusion in regard to the appearance there of any channel or other than a mere depression of the prairie, it being of the evidence that the grass and weeds grew on the whole surface of the ground at this particular place, and that the land in the depression was cultivated, and grains or grass sown or planted there. It is contended the findings of the jury fully determined that this was not the course of a stream of water having a spring as its source, continuous in its flow, or of any permanency, but was the way in and through which naturally flowed streams of water having no permanency or regularity as to time of flow, and dependent upon transient causes alone for their origin or source. It was not within the definition of a "water-course" as defined in the opinion in the case of *Pyle v. Richards*, 17 Neb., 180, wherein it was said: "To constitute a water-course the size of the stream is not material. It must, however, be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous." In *Hoyt v. City of Hudson*, 27 Wis., 656, it was said of a water-course: "There must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of the tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the waters flowing in hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water."

According to the third finding of the jury the outlet for water drawn into question in this case, had some of the

essential distinctive attributes of a water-course, but lacked others,—among them a frequent flow of water, or a flow which had any definite, and other than an occasional, source. It was confined to drainage of surface water. The doctrine of the common law in regard to surface water is in force and prevails in this state as a general rule. Under this rule such water may be controlled by the owner of the land on which it falls or over which it flows. He may appropriate to his own use all that falls or comes on his land and refuse to receive any that falls upon or comes on his neighbor's land. "The doctrine of this court is the rule of the common law,—that surface water is a common enemy, and that an owner may defend his premises against it by dyke or embankment, and if damages result to adjoining proprietors by reason of such defense, he is not liable therefor." (*Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb., 526.) The general rule has been applied and enforced by this court in several instances,—notably in the case of *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb., 406; also in *Bunderson v. Burlington & M. R. R. Co.*, 43 Neb., 545, in which the rule announced in *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138, was followed. A modification of the general rule, or rather its application in connection with the time-honored and just maxim that each one must so use his property as not to injure the rights of another, has been recognized in the opinion in the case of *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897, wherein it was stated: "Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow onto the premises of the latter to his damage. But if in the execution of such enterprise he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor." This was followed in *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb., 526. (See,

also, *Jacobson v. Van Boening*, 48 Neb., 80.) The flow of surface waters is governed, and certain distinctive characteristics given it, by the natural conditions of the surfaces of lands over which it takes its way. If the land is hilly and full of sharp irregularities, the water may be forced rapidly toward a common point of final drainage, through a gorge or ravine originally formed by the action of the waters, or there may be a gradual or uniform slope from all directions of a large body of land to one place of common drainage, and a resultant, well-defined, final avenue of escape for the surface waters made by the large quantities which have from time to time run through it. This last may be said to be the condition, as ascertained and fixed by the jury in the findings, existent at the place drawn into controversy in the present case. On the other hand, there may be a flow of diffused waters over the surface of lands, which passes across the country in such condition, and nowhere gathers in large or restricted volume, or in any stream confined within banks or in a channel. This last may be said to be true surface drainage, as to which the general rule of law is applicable in its full force. This flow, if deflected from its course, would be but the turning of a dispersed flow, at no point great, and not liable to cause damage. There are and should be no exceptions to the general rule unless demanded by necessity. In the case at bar the jury determined that the surface waters had flown from this body of land in a channel with banks and clearly-defined water-course. They had made for themselves a channel, through which, during certain months when there were heavy rains, they flowed regularly. This channel must be said to have possessed the characteristics of a water-course, and that there was the necessity for some provision to be made at the time the embankment was built for the uninterrupted flow of the waters in the same direction and in the channel. By making the necessary culvert or passage way under its embankment, the company could not be charged with having collected the surface waters in a body, and

thrown them in unwonted quantities upon the premises of its adjoining property owner. It would be receiving the waters as naturally collected, and allowing them to flow as had been their wont theretofore, and would be using its property with as little injury to that of others as might be, or the necessities demanded. It would thus bring itself within all the rules or fair exceptions thereto.

The facts in the case of *Lincoln & B. H. R. Co. v. Sutherland, supra*, constituted it one very similar in its leading elements to the case at bar. A summary of some of the main facts, as given in the syllabus to the opinion, is as follows: "A draw some seven miles in length crossed the premises of a farmer. The surface waters produced by rains and melting snows were wont to run into this draw from the surrounding territory and thence find their way to the Platte river. A railroad company constructed its road-bed across the premises and built an embankment, without culvert or opening over the draw." In a suit by the owner of the land against the company for damages for negligently constructing the embankment without an opening, whereby the surface waters were stopped and overflowed the land, and destroyed the crops thereon, it was held to call for the application of the rule against the railroad company, that a proprietor must so use his property as not to unnecessarily and negligently injure his neighbor, and the question of negligence was one to be determined by the jury. As we view the case at bar it was one for the application of the same rule; of necessity presented an exception to the general doctrine in regard to surface waters; and the question of the negligence of the company in the construction of its embankment was for the jury to settle. It was submitted to them, and though not the subject of a special finding, we must conclude that it was embodied as one of the conclusions on which the jury passed by its general verdict. A finding that there was no negligence shown which was the natural and proximate cause of the injury to plaintiff's property was amply supported by the evidence. We must conclude

that the verdict of the jury was sustained by the evidence, and not contrary to the rules of law applicable to the facts.

It is urged that the court erred in refusing to give certain instructions prepared and tendered on behalf of the plaintiff. The assignment in relation to this alleged error in both the motion for new trial and petition in error was in gross as to the seven instructions included. Of these, the one numbered 5 was erroneous, in that it ignored the question of negligence on the part of defendants as an element of the plaintiff's right to recover. This being determined we need not further examine the assignment.

One assignment of error is based upon the proposition, that it was the duty of the trial court, in submitting special questions to the jury, to have included one to which an answer would have disclosed what the jury estimated to be the amount of the damages caused to the property of plaintiff by the waters, so that if it became necessary to render judgment on the special findings for plaintiff, as is the contention should now be done, it would be possible to do so intelligently and in full. Sections 292 and 293 of the Code of Civil Procedure, upon the subject of special verdicts, are as follows:

"Sec. 292. A special verdict is that by which the jury finds the facts only. It must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented as that nothing remains to the court but to draw from them conclusions of law.

"Sec. 293. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict, in writing, upon all or any of the issues; and in all cases may instruct them if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered on the journal."

Under these it would seem that the court may direct special findings on any one or all of the issues of fact, but, however this may be, it appears from the record that counsel for plaintiff excepted to the submission to the jury of any of the list of questions calling for special findings or verdict. If any other or different from those submitted were desired, they should have been prepared and submitted to the court by counsel, or at least there should have been a request for the submission of such further queries as were desired, and if refused, an exception noted. This not having been done, the assignment must be overruled. (*Everson v. Graves*, 26 Neb., 262; *First Nat. Bank of North Bend v. Miltonberger*, 33 Neb., 847.)

Error is also assigned of the action of the court in receiving the special verdict with one of the questions therein unanswered. Query numbered 8, was as follows:

"Was the grade of Twenty-seventh street in front of the store building of plaintiff which contained the goods said to have been damaged established prior to the building of said store by the plaintiff?

"A. Don't know."

It is urged that this was not an answer to the question, and that it was error to receive the special verdict with this answer in the form in which it appeared; and the case of *Doom v. Walker*, 15 Neb., 339, is cited in which it was held: "Where, under the provisions of section 293 of the Code of Civil Procedure, the court shall have instructed the jury that if they render a general verdict, to find upon particular questions of fact, stating the same in writing, and directing a written finding thereon, the jury shall fail to agree to a finding upon the whole or a part of such questions, but shall find a general verdict, it is error upon the part of said court,—over the objection of the defendant against whom is the said general verdict,—to receive such verdict, and judgment thereon will be reversed." (See, on the same subject, *Sandwich Enterprise Co. v. West*, 42 Neb., 722.) While the foregoing is the rule, it is also true that where a question is submitted for spe-

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cial finding which is immaterial under the pleadings and evidence in the cause on trial and the jury fails to answer the question, it will furnish no ground for reversal of a judgment rendered on a general verdict returned by the jury. (*Missouri P. R. Co. v. Vandeventer*, 26 Neb., 222.) In the case at bar the question submitted which the jury did not answer was immaterial under the pleadings and evidence and in view of the findings of the jury on the other questions which it considered and answered; hence, if any error in the action of the court in the rendition of a judgment on the general verdict, over the objection of the plaintiff, it was error which was not prejudicial to his rights, from which it follows that this assignment is unavailing and must be overruled.

It is also argued that the general and special verdicts were inconsistent; that under such a condition it was error for the trial court to render judgment in accordance with the general verdict. The rule invoked is correct, but not applicable in this case. The verdicts were not inconsistent, but in harmony.

It follows from the foregoing discussion that the judgment of the district court will be

AFFIRMED.

**HIRAM W. OLCOTT, APPELLEE, v. JOHN A. BOLTON,
APPELLANT.**

FILED MARCH 3, 1897. No. 7026.

1. **Action to Rescind Contract of Sale of Bank Stock: FALSE REPRESENTATIONS: DECREE FOR PLAINTIFF.** Evidence held sufficient to sustain the findings and judgment of the trial court.
2. **Sales: FALSE REPRESENTATIONS: RESCISSION.** If to induce a party to purchase capital stock of a corporation representations are made of material facts which, if true, would enhance the value of the stock, but which are false, to the knowledge of the vendor, or, if without knowledge the statements are made by him as representations of positive to him known facts, if believed to be true

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and relied and acted upon by the vendee in making the purchase, and to his injury, an action of damages or for rescission of the sale accrues in favor of the vendee.

3. ———: ———: ———. If representations consist of direct statements or asserted facts, and to ascertain their truth or falsity would necessitate an examination or investigation, the party to whom they are made may place reliance on them.
4. ———: ———: ———. That the complainant obtained information on the same subject other than that contained in the representations, but from which he did not learn their falsity, will not deprive him of his right of action.
5. ———: ———: ———: RETURN OF PROPERTY. Where the evidence sustains a finding that as soon as plaintiff in an action for the rescission of a sale alleged to have been induced by false representations of the vendor discovered the falsity of the representations he tendered a return of the property and demanded a rescission of the sale, it is sufficient as to the point in regard to the time rescission was demanded.

APPEAL from the district court of Lancaster county.
Heard below before STRODE, J. *Affirmed.*

The opinion contains a statement of the case.

Mockett, Rainbolt & Polk and *J. R. Webster*, for appellant:

On plaintiff's own evidence the representations were not in the nature of warranty, but at most a mere expression of opinion, which the evidence shows beyond doubt, and the court affirmatively finds, were stated in good faith. Upon the proofs and findings, in any event, a decree should have been entered in favor of this appellant. (Adams, Equity [7th ed.], p. 178; *Spence v. Duren*, 3 Ala., 251; *Pasley v. Freeman*, 3 T. R. [Eng.], 51; *Freeman v. Baker*, 5 B. & Ad. [Eng.], 797; *Ormrod v. Huth*, 14 M. & W. [Eng.], 651; *Parmelee v. Adolph*, 28 O. St., 10; *Lord v. Goddard*, 13 How. [U. S.], 198; *Russell v. Clarke*, 7 Cranch [U. S.], 93; *Tryon v. Whitmarsh*, 1 Met. [Mass.], 1; *Meyer v. Amidon*, 45 N. Y., 169; *Cowley v. Smyth*, 46 N. J. Law, 380; *Stone v. Demy*, 4 Met. [Mass.], 151; *Young v. Covell*, 8 Johns. [N. Y.], 25; *Hopper v. Sisk*, Smith [Ind.], 102; *Fooks v. Waples*, 1 Har. [Del.], 131; *Boyd v. Browne*,

6 Pa. St., 316; *Weeks v. Burton*, 7 Vt., 67; *Wells v. Jewett*, 11 How. Pr. [N. Y.], 242; *Ashlin v. White*, 1 Holt [Eng.], 387; *Shrewsbury v. Blount*, 2 Man. & G. [Eng.], 475.)

If the means of knowledge are at hand, and equally available to both parties, and the subject-matter is open to the inspection of both alike, and there are no fiduciary or confidential relations, and no warranty of the facts, the injured party must show that he has availed himself of the means of information existing at the time of the transaction before he will be heard to say that he was deceived by the misrepresentation of the other party. (*Rudd v. Robinson*, 126 N. Y., 113; *Champion v. Woods*, 12 Am. St. Rep. [Cal.], 126; *Leggett v. New Jersey Mfg. Co.*, 23 Am. Dec. [N. J. Eq.], 728; *Wakeman v. Dalley*, 51 N. Y., 27; *Swentzel v. Pennsylvania Bank*, 147 Pa. St., 140; *Maisch v. Seamen's Saving Fund*, 5 Phila. [Pa.], 30; *Briggs v. Spaulding*, 141 U. S., 132; *In re Forest*, 10 Ch. Div. [Eng.], 450; *Spering's Appeal*, 10 Am. Rep. [Pa.], 684; *Ackerman v. Halsey*, 37 N. J. Eq., 363; *Hun v. Cary*, 82 N. Y., 65; *In re Denham*, 25 L. R., Ch. Div. [Eng.], 752; *Watt's Appeal*, 78 Pa. St., 391.)

To entitle a party to rescind a contract for the sale of chattels on the ground of fraud, he must offer to return the property received by him and demand a rescission within a reasonable time after discovery of the fraud. (*Brown v. Waters*, 7 Neb., 428; *Kingsley v. Wallis*, 14 Me., 57.)

R. D. Stearns and E. C. Strobe, contra:

If the representations of appellant in regard to the stock and condition of the bank were in fact false, appellee is entitled to a rescission, though appellant believed his statements were true when made. (Kerr, *Fraud & Mistake*, p. 53; 1 Story, *Equity Jurisprudence*, sec. 193; Adams, *Equity*, p. 177; 2 Pomeroy, *Equity*, sec. 885; Bigelow, *Law of Fraud*, p. 413; *Martin v. Hill*, 43 N. W. Rep. [Minn.], 337; *Mitchell v. Zimmerman*, 4 Tex., 75; *Stimson v. Helps*, 9 Colo., 33; *Allen v. Hart*, 72 Ill., 104;

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Booth v. Smith, 117 Ill., 370; *Bowen v. Schuler*, 41 Ill., 192; *Miner v. Medbury*, 6 Wis., 294; *Holcomb v. Noble*, 37 N. W. Rep. [Mich.], 497; *Parmelee v. Adolph*, 28 O. St., 10; *Chat-ham Furnace Co. v. Moffatt*, 18 N. E. Rep. [Mass.], 168; *Gray v. Robbins*, 11 Atl. Rep. [N. J.], 680; *Kennedy v. McKay*, 43 N. J. Law, 288; *Rimer v. Dugan*, 39 Miss., 477; *Shackelford v. Handley*, 10 Am. Dec. [Ky.], 753; *East v. Matheny*, 10 Am. Dec. [Ky.], 721; *Yeater v. Hines*, 24 Mo. App., 619; *Linhart v. Foreman*, 77 Va., 540; *Lowe v. Trumble*, 78 Va., 65; *Nelson v. Wood*, 62 Ala., 175; *Bridge v. Penniman*, 12 N. E. Rep. [N. Y.], 19; *Leavitt v. Sizer*, 35 Neb., 80; *Phillips v. Jones*, 12 Neb., 215.)

Appellant, as a director of the Nebraska Savings Bank, is conclusively presumed to know the financial condition of the bank. As such director he is conclusively presumed to know the falsity of his statements to appellee in regard to the prosperous condition of the bank. (*Speck v. Rigg'n*, 40 Mo., 405; *Hun v. Cary*, 37 Am. Rep. [N. Y.], 546; *German Savings Bank v. Wulfekuhler*, 19 Kan., 60; *Merchants Bank v. Rudolph*, 5 Neb., 527; *McDowell v. Arkansas M. & A. Co.*, 38 Ark., 17; *Seale v. Baker*, 7 S. W. Rep. [Tex.], 742; *Prewett v. Trimble*, 17 S. W. Rep. [Ky.], 356; *Tyler v. Savage*, 143 U. S., 79; *Martin v. Webb*, 110 U. S., 7; *Foley v. Holtry*, 43 Neb., 137.)

HARRISON, J.

In this, an action instituted in the district court of Lancaster county, the appellee sought and was accorded a decree by which was effected a rescission of a contract of sale to him by appellant of a number of shares of the stock of the Nebraska Savings Bank. The grounds for rescission were the alleged false representations of the appellant, by which, it was claimed, the appellee was induced to purchase the stock. The sale was made on or about January 7, 1893, and this suit was brought June 22 of the same year. Defendant's answer contained a denial of any false representations on his part, and contained affirmative allegations that the statements made

by him to appellee in the course of the contract of sale were true, and were made in good faith; also denial that appellee relied in the purchase of the stock on statements of appellant, and further stated that appellee made inquiries elsewhere, and of other persons, and thus obtained the information on which he relied in making the purchase; and further, that with full knowledge of all the facts in relation to the stock and its value, as affected by the condition of the bank financially, the appellee held and controlled the stock for a number of months.

The appellant argues: "First, the evidence is insufficient to sustain a judgment against him; second, that upon the findings of the court and proof, judgment should have been in favor of appellant." The trial judge, in compliance with a request of appellant's counsel, made written findings of facts, among which was one in regard to the representations made, from which we gather clearly that they were not only such as might be regarded as opinions with reference to the value of the stock, as the counsel for appellant contend, but were in relation to the then existing condition of the bank; and they were material, for, if true, the value of the stock would be much enhanced, and if false, correspondingly decreased. There was also a finding that the representations made by appellant were untrue, and further, that the appellee relied upon them as true in the purchase of the stock. There was a further finding that the appellant did not know that what purported to be the facts of his statement were false or different than he asserted. We will here say that at the time of the negotiations between the parties, which culminated in the sale of which the rescission is herein sought, the appellant stated the fact that he was then, and had been for some considerable time, a director of the bank, the stock of which was the subject of sale. It was also of the findings that appellee, as soon as he ascertained that the representations made by appellant at the time of the sale were untrue, tendered a return of the stock and demanded a rescission, which was refused.

In respect to the contention that the judgment is not sustained by the evidence, we have carefully examined the evidence, and while it is conflicting as to many points in issue, the findings of the court upon which the judgment is based are sufficiently supported by the evidence and will not be disturbed. We do not deem a discussion of the evidence in detail necessary here, hence omit it. The rules of law applicable to the facts, reduced to conclusions as embodied in the findings of the trial court, may be said to be well established. As was stated in an opinion of this court, written by IRVINE, C., in the case of *Foley v. Holtry*, 43 Neb., 137, in which the rescission of a sale of shares of the capital stock of a corporation was in issue: "The elements necessary to sustain such an action have been recently summarized by this court as follows: (1) It must be alleged and proved what representation was made; (2) that it was false; (3) that plaintiff believed the representation to be true; (4) relied on and acted upon it; (5) and was thereby injured. (*Stetson v. Riggs*, 37 Neb., 797.)" But in this case we have another fact; *i. e.*, the party who made the representations was without knowledge as to their truth or falsity, and believed them to be true. In the opinion in *Foley v. Holtry*, *supra*, it was observed on this point: "To these requirements the courts formerly added another, to-wit, that defendant must have known that the representations were false. A more accurate statement, in view of the later decisions, would be that the defendant must either know that the representations were false, or else they must be made, without knowledge, as positive statements of known fact. The rule as thus formulated practically charges the defendant with notice of the truth in all cases where he makes positive representations of existing facts." It is claimed that the appellee might have made such an examination of the affairs of the bank and of its condition financially as would have afforded him full information in regard thereto, and that it devolved upon him so to do. With this view we cannot agree.

The statements of appellant were what purported to be facts known to him, and were positive in their character, and the appellee could not have ascertained their truth or falsity without an investigation. Under such conditions he was warranted in relying upon the representations as made. (*Foley v. Holtry, supra.*)

It is also urged that the appellee made inquiries of other persons in regard to the capital stock of the bank and its value, and also the other matters that were subjects of the representations made by appellant; that having done so and thus obtained information thereupon, he must be presumed to have relied upon such information, and not upon the representations of appellant. It was shown that appellee had a conversation with at least one other person besides appellant in regard to the stock of the bank, its value, and other points bearing on such value; but it does not appear that by so doing he discovered, to any extent or in any particular, the falsity of the representations made by appellant, nor does it appear that he relied in any degree upon the information thus obtained; hence the fact that he had such conversation did not impair his right to this action against the appellee.

The judgment of the district court was sufficiently sustained by the evidence, and in accordance with the rules of law applicable to the facts, and will be

AFFIRMED.

McKINLEY-LANNING LOAN & TRUST COMPANY, APPELLANT, v. EDWARD C. ALDRICH ET AL., APPELLEES.

FILED MARCH 3, 1897. No. 7137.

Usury. To constitute a plea of usury facts must be stated which disclose a contract between the parties thereto by which there is received or reserved a rate of interest in excess of the maximum allowed by law.

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APPEAL from the district court of Frontier county.
Heard below before WELTY, J. *Reversed.*

Tibbets, Morey & Ferris, for appellant.

J. H. Broady, *contra*.

HARRISON, J.

The plaintiff commenced this action in the district court of Frontier county to foreclose real estate mortgages. At a trial of the issues joined the trial court entered a decree of foreclosure, by which the amount of plaintiff's alleged claim was reduced by the favorable finding on the allegation in the answer that the loan transaction evidenced by the notes and mortgage in suit was usurious. The plaintiff has appealed to this court. Subsequent to the appearance of the record here a motion was made to quash the bill of exceptions, which, on hearing, was sustained; hence the evidence adduced on the trial is not before us, and the sole question for determination is, will the pleadings support the judgment rendered? and is to be settled by an examination of the answer, to ascertain whether, to the extent there was attempted in it to set up the usurious character of the transaction of the mortgage loan, it was, as a plea thereof, sufficient. The portion of the answer we have referred to was as follows, after admitting the execution and delivery of the notes and mortgages alleged in the petition: "That the notes and mortgages described in plaintiff's petition were given for a loan of \$800, running for five years, at ten per cent interest per annum from date, payable semi-annually; that the notes of \$12 each described in count 1 of plaintiff's petition had no other consideration than that of being for a part of the interest on the said loan of \$800, and admits the matters alleged in count 2 of said petition to be true. Alleges that said transaction and loan of \$800 as above set forth and the notes and mortgages given in connection with said trans-

action are usurious in this, that in the making thereof the payees, W. H. Lanning and W. H. Lichty, in addition to the contract by said defendant to pay them ten per cent per annum, the full amount allowed by law, received and reserved \$100 as illegal interest and bonus on said loan; that of said loan of \$800 defendants only received the sum of \$700, as follows: \$350 at the time said loan was made, and \$350 sixty days thereafter; that the rate of interest on said loan amounted to more than ten per cent per annum, and that the above transaction was between W. H. Lanning and W. H. Lichty and said defendants."

In the decision of the case of *Leonard v. Cox*, 10 Neb., 541, which was an appeal by the plaintiff in the case from a decree of foreclosure of a mortgage in which he had been adjudged to receive a less sum than claimed, by reason of the favorable consideration in the trial court of the defendant's plea of usury, it was held in the opinion, written by MAXWELL, C. J.: "To constitute usury there must be a contract between the lender and the borrower, by which the lender receives or reserves a greater rate of interest than the maximum allowed by law;" citing *Richards v. Kountze*, 4 Neb., 205. And in the case of *New England Mortgage Security Co. v. Sandford*, 16 Neb., 689, wherein the sufficiency of an answer or plea of usury in the foreclosure of a mortgage loan was under consideration, the plea in that case being very similar to the one in the case at bar, in practical effect the same, it was said in the opinion, written by MAXWELL, J.: "The proof cannot make a stronger defense than the answer in the case. It is therefore essential, in pleading usury, to state with whom the usurious agreement was made, its nature, and the amount of usurious interest agreed upon or received. (*Manning v. Tyler*, 21 N. Y., 567; Maxwell, Pl. [3d ed.], 105.) The court will not presume that the parties intended to evade the law, but there must be an allegation to that effect."

In the case of *Rose v. Munford*, 36 Neb., 148, in which,

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inter alia, the sufficiency of a plea of usury in an answer was considered, it was stated: "We agree with appellee that the answer does not allege sufficient facts to constitute the defense of usury. To make a contract usurious there must be an agreement between the borrower and lender by which the latter receives or reserves a greater rate of interest than the law allows. There must be an intent on the part of the borrower to give and of the lender to receive interest in excess of the legal limit. (*Leonard v. Cox*, 10 Neb., 541; *New England Co. v. Sandford*, 16 Neb., 689.) Testing the answer by the above rule, the pleading is clearly insufficient. The facts alleged therein do not show that the contract was usurious; nor can it be inferred from the facts stated that there was an intent to evade the law on the subject of usury. It fails to aver the rate of interest agreed upon. True, the answer sets up the amount of money received by Munford on the loan, but it does not state that the difference between the amount so received and the face of the note was intentionally retained by Sandford as interest, nor can any such a conclusion be properly drawn from the facts alleged." (See, also, *Anglo-American Land Mortgage & Agency Co. v. Brohman*, 33 Neb., 409; *Rainbolt v. Strang*, 39 Neb., 339; *Bell v. Stowe*, 44 Neb., 210.) Tested by the established rule in this state, set forth in the cases to which we have referred, the plea of usury in the answer in the case at bar is insufficient. It fails to show the intent with which the amount alleged to have been reserved was so retained, or that it was pursuant to any contract or agreement between the parties as interest on the principal sum. The answer was insufficient and the judgment must be reversed and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

H. M. HOPEWELL V. M. S. MCGREW, ASSIGNEE.

FILED MARCH 3, 1897. No. 7147.

1. **Pleading: WAIVER OF DEFECT.** That the party answers over after his general demurrer to a petition is overruled is not a waiver of the defect that the petition fails to state a cause of action. (*Cox v. Peoria Mfg. Co.*, 42 Neb., 660.)
2. **Principal and Surety.** The liability of a surety is measured by, and will not be extended beyond, the strict terms of his contract.
3. **Attachment Bond: SURETIES.** The obligation of a surety in an undertaking in attachment is to pay the obligees thereof the damages sustained by reason of the attachment, "if the order be wrongfully obtained."
4. **Action on Attachment Bond: PLEADING.** The petition disclosed that the action was brought by the assignee of a party, a stranger to those described in the attachment bond, and was one for damages which he claimed to have sustained by reason of the seizure under the writ of attachment of property of which he was in possession as such assignee. *Held*, Not to state a cause of action on the bond.

ERROR from the district court of Burt county. Tried below before AMBROSE, J. *Reversed*.

E. W. Peterson, for plaintiff in error.

Charles T. Dickinson, *contra*.

HARRISON, J.

This, an action on an undertaking in attachment proceedings, was instituted in the district court of Burt county November 27, 1891. A trial of the issues presented by the pleadings as settled and filed in accordance with the rulings of the court resulted in a judgment in plaintiff's favor, and the case has been removed to this court by error proceedings on the part of defendant.

The plaintiff in error was surety upon the attachment bond in suit and the action was against him alone, his principal not being joined. By one of the assignments of error the point is raised, were there sufficient facts

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stated in the petition to constitute a cause of action? The petition we will now give in part as it appears in the record, and of other portions the substance, as follows:

"Comes now the above named plaintiff and for cause of action against said defendant complains and says, that heretofore, to-wit, on the 7th day of October, 1889, Charles Erickson, a merchant doing business at Oakland, Nebraska, executed and delivered to F. F. Parker, sheriff of Burt county, Nebraska, a deed of assignment of all his property, for the benefit of his creditors; that within twenty-four hours after the execution and delivery of said deed to the said Parker, the said Parker caused the same to be recorded in the office of the clerk of Burt county, Nebraska, and immediately took possession of all the property of said Charles Erickson; that afterwards, to-wit, on the 14th day of June, 1890, one James R. Foree was duly elected by the creditors of said Erickson as assignee, due and legal notice of the time and place of said election having been given by the county judge of said county, as required by law. Immediately after said election the said Foree gave the bond required and entered upon the discharge of his duties as assignee of said estate.

"Plaintiff further represents that the term of office of said F. F. Parker expired in January, 1890, and the plaintiff herein is the duly elected, qualified, and acting successor in office of the said Parker as sheriff as aforesaid.

"On the 9th day of September, 1891, upon the application of the J. T. Robinson Notion Company, Sweet, Dempster & Co., and other creditors of said Charles Erickson, the county court made an order removing said James R. Foree from the further execution of said trust, and restored the plaintiff herein, as the sheriff of said county, to the execution of said trust, from which order no appeal has been taken, and the same remains unreversed and in full force and effect.

"Plaintiff further represents that on the 12th day of October, 1891, Henry W. King & Co., of Chicago, Illinois,

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commenced in the district court of Burt county, Nebraska, an action by attachment against the firm of Anderson & Erickson, and F. F. Parker as assignee, for the recovery of money from said firm, alleging in the affidavit for said attachment and as a ground for said attachment, 'That said Anderson & Erickson has assigned, removed, and disposed of a part of the said firm property with the intent to defraud their creditors, and the creditors of said firm, and that said Anderson & Erickson are about to dispose of the balance of their property with the intent to defraud their creditors, and the creditors of the firm; that the said Anderson & Erickson are about to convert their partnership property into money for the purpose of placing it beyond the reach of their creditors.'

"That said Anderson & Erickson have turned over all their firm property to F. F. Parker, sheriff of Burt county, Nebraska, upon a pretended assignment for the benefit of the creditors of Charley Erickson, but that said pretended assignment was fraudulently made and for the purpose of defrauding the creditors of the firm, and is illegal and void."

At the same time said Henry W. King & Co., and the defendant herein, H. M. Hopewell, executed and delivered to the clerk of said court the following undertaking:

"In the District Court of Burt County, Nebraska.

"HENRY W. KING, WILLIAM C. BROWNING, and EDWARD W. DEWEY, partners doing business under the name and style of Henry W. King & Co., Plaintiff,

v.

ANDERSON & ERICKSON, a firm doing business in Nebraska and not incorporated, and F. F. PARKER, Sheriff of Burt County, Nebraska, as assignee, Defendants.

"Whereas said Henry W. King, William C. Browning,

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and Edward W. Dewey, doing business under the name and style of Henry W. King & Co., have commenced an action in the district court of Burt county against said Anderson & Erickson to recover the sum of \$1,306.50 and have filed the necessary affidavit to obtain an order of attachment against said Anderson & Erickson: Now therefore we, Henry W. King & Co., of Chicago, and H. M. Hopewell, of Burt county, do hereby undertake to said Anderson & Erickson, defendants, in the penal sum of \$3,000, that the plaintiff shall pay the defendants all damage not exceeding the above amount which said defendant may sustain by reason of the attachment in this action if the order therefor be wrongfully obtained.

"HENRY W. KING & CO.,

"By E. W. PETERSON,

"Their Attorney.

"H. M. HOPEWELL.

"I do hereby approve the above undertaking and the sureties thereon.

F. E. WARD,

"Clerk of Dist. Court."

It was further stated that a writ of attachment was issued and "Which order was levied upon the following goods and chattels of the said Charles Erickson: all of the stock of dry goods, clothing, gents' furnishing goods, hats, caps, notions, boots and shoes, being all of the goods and store fixtures of the said Charles Erickson, also all the books of account belonging to said Erickson, all of said stock, fixtures, and accounts and books of account formerly belonging to the firm of Anderson & Erickson, but at the time of the levy of said order of attachment, and for some time prior thereto, had been transferred over to the said Charles Erickson by said firm, and by the said Erickson transferred over to the said F. F. Parker, as sheriff of said county as temporary assignee, under said deed of assignment, and at the time of said levy the firm of Anderson & Erickson had no interest in said goods; that all of said goods above described were taken into the care and custody of the coroner of said county, the sheriff

being a party to such action, and detained by said coroner for the period of ——— days." There were further allegations, from which it appeared that the attachment was, on motion, dissolved and the attachment proceedings dismissed, from which adjudication there had been prosecuted no proceedings for its reversal, and after some further statements in regard to damages, which need no particular notice at this time, the petition closed with a prayer for judgment. To this petition was interposed the following demurrer:

"The defendant demurs to the petition of the plaintiff for the following causes, which appear on the face of the petition:

"1. The plaintiff has not legal capacity to sue.

"2. There is a defect of parties defendant.

"3. There is a defect of parties plaintiff.

"4. The petition does not state facts sufficient to constitute a cause of action."

Which was overruled and an answer which was in effect a general denial was filed for plaintiff in error. At the inception of the introduction of the evidence, objection was made to further proceeding in that direction on the ground that no cause of action was stated in the petition. The objection was overruled and evidence received. The plaintiff in error, notwithstanding he answered after the overruling of his general demurrer, may now be heard to insist on his objection that the petition did not state facts sufficient to constitute a cause of action. (*Cox v. Peoria Mfg. Co.*, 42 Neb., 660; *Farrar v. Triplet*, 7 Neb., 237; *O'Donohue v. Hendrix*, 13 Neb., 255; *Burlington & M. R. R. Co. v. Kearney Co.*, 17 Neb., 511; *Singer Mfg. Co. v. McAllister*, 22 Neb., 359; *Renfrew v. Willis*, 33 Neb., 98; 6 Ency. Pl. & Pr., 365.) What we have just stated being the rule, the question then is presented in this case, was there a cause of action against plaintiff in error and against defendant in error, stated in the petition?

The basis of the action, as pleaded in the petition, was the undertaking in attachment, which, by its terms, was

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for the benefit and security of Anderson & Erickson, and not of defendant in error. It is not disclosed in the petition that the Charles Erickson, of whom the defendant in error was the assignee, was the Erickson who figured as one of the partners of the firm of Anderson & Erickson, or that he was other than a stranger to said firm; hence he must here be considered as a third person and as not being connected with the partnership. It is true that defendant in error, as assignee of Charles Erickson, was made a party defendant in the suit in which the attachment was issued and in the attachment proceedings. It is further true that as assignee of Erickson the defendant in error was in possession of the goods upon which the levy of writ of attachment was made. Why the defendant in error was made a party in the attachment case is not disclosed in the petition in this action, but presumably it was that his rights in and to the attached property might be litigated in that suit. It is a well-established general rule that the liability of a surety is governed by and will not be extended beyond the precise terms of the contract. (*Curtin v. Atkinson*, 36 Neb., 110; *Crane v. Specht*, 39 Neb., 123.) The bond on which this suit was predicated, signed by plaintiff in error as surety, was in terms for the benefit of Anderson & Erickson, the partnership, to secure it against damages if the writ was wrongfully obtained, and could not inure to the defendant in error as the assignee of the individual personal property of Charles Erickson, though it was the same property attached as belonging to the partnership. The assignee was not a party to the bond, and his rights, if any, in the property, were not covered by the bond. The assignee occupied no better position than would a third person not a party to the suit, whose property might have been attached or who might have claimed the property attached, as a purchaser from Erickson, and such third person clearly could claim no rights under the bond. (*Edwards v. Turner*, 6 Rob. [La.], 382; *Davis v. Commonwealth*, 13 Gratt. [Va.], 139; 1 Shinn, Attachment & Garnishment,

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sec. 185; *Mason v. Rice*, 23 N. W. Rep. [Ia.], 384.) The undertaking of the surety in attachment is to pay such damages as the obligees may sustain by reason of the attachment, "if the order be wrongfully obtained." If the officer, by virtue of the writ, seizes the property of a person other than the one whose property the writ commands him to take, the damages, if any, occasioned by the levy do not arise from the wrongful suing out of the writ, but are the result of its wrongful levy. (*Mason v. Rice*, *supra*.) In the case at bar the damages, if any, suffered by the assignee were not by reason of the writ of attachment having been wrongfully obtained, but because of its wrongful levy. The bond was not made for his protection and was not intended to and did not cover or was not security against a wrongful levy on or seizure of property in his possession and to which he had the right; hence no action on the facts as stated in the petition arose in his favor. It follows from the views expressed that the petition did not state a cause of action in favor of defendant in error, therefore the judgment of the trial court in his favor must be reversed and the cause remanded.

REVERSED AND REMANDED.

THOMAS ROBINSON ET AL. V. KILPATRICK-KOCH DRY
GOODS COMPANY.

FILED MARCH 3, 1897. No. 7182.

1. **Chattel Mortgages: TITLE.** A chattel mortgage creates a lien on the property described therein but does not pass the legal title thereto.
2. **Petition in Error: AMENDMENT.** A party will be allowed to amend his petition in error to cover a point which, so far as the record discloses, was presented in the trial court.

3. **Replevin: PLEADING: CHATTEL MORTGAGES: EVIDENCE.** The introduction in evidence of a chattel mortgage, in which is described property the subject of an allegation of general ownership and right of possession in the plaintiff in an affidavit and petition in a replevin action, is not proof of such allegation.

ERROR from the district court of Buffalo county.
Tried below before BATES, J. *Reversed.*

Greene & Hostetler, Dryden & Main, and George E. Evans,
for plaintiffs in error.

Calkins & Pratt, contra.

HARRISON, J.

It appears herein that some time prior to and during the year 1890 W. L. Randall was engaged in mercantile business in the village of Gibbon, Buffalo county, this state. In the course of such business he became indebted to a number of wholesale dealers for goods and merchandise, including the Kilpatrick-Koch Dry Goods Company, defendant in error in this cause. November 20, 1890, the defendant in error obtained from Randall a chattel mortgage on his stock of merchandise to secure the payment of his indebtedness to the company, and on the same date other chattel mortgages, in favor of other parties and firms, were executed by Randall, a number of which were subsequently, together with the accounts or notes the payment of which they were given to secure, assigned to defendant in error. The company took possession of the stock of goods under its mortgage, and other parties instituted actions and attachment proceedings. In some of the actions judgments were obtained and executions issued. After service of the writs of execution and attachment on the stock of merchandise by the plaintiffs in error, one of them the sheriff of Buffalo county and the other a constable, the defendants in error commenced this, an action of replevin, against the officers to recover the possession of the merchandise. A trial of

the issues in the case resulted in a verdict and judgment favorable to the company. The unsuccessful parties have prosecuted error proceedings to this court.

The counsel for plaintiffs in error made application, by motion, for leave to amend the petition in error to include an assignment that the evidence was insufficient to support the verdict, which has been granted. It is disclosed by the record presented here that one of the grounds of the motion for new trial in the district court was the insufficiency of the evidence to sustain the verdict rendered. From this it must be concluded that the question was raised in the trial court, hence the amendment was proper and allowable. The averments in regard to the defendant in error's ownership of the merchandise in controversy were identical in the petition and the replevin affidavit, being in each an allegation of general ownership and in the following terms: "That the plaintiff is the owner and entitled to the immediate possession of the following described goods and chattels, to-wit:" The verdict was: "That the plaintiff, at the commencement of the action, was the owner and entitled to the possession of the goods described in plaintiff's petition." The evidence introduced to show ownership in the defendant in error was the chattel mortgage executed and delivered to the company by Randall, and the other chattel mortgages on the stock of goods of which it had received assignments. These did not prove the defendant in error to be the owner of the title to the goods; did not prove him to be the "owner" as alleged in the petition and as determined in the verdict. The title to mortgaged chattels remains in the mortgagor until divested by foreclosure of the mortgage. The mortgagee of chattels acquires by the execution and delivery of the mortgage a lien on the property described therein, but does not take the legal title. (*Musser v. King*, 40 Neb., 892; *Randall v. Persons*, 42 Neb., 607; *Sharp v. Johnson*, 44 Neb., 165; *Camp v. Pollock*, 45 Neb., 771; *Murray v. Loushman*, 47 Neb., 256; *Garber v. Palmer*, 47 Neb., 704;

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Griffing v. Curtis, 50 Neb., 334; *Strahle v. First Nat. Bank of Stanton*, 47 Neb., 321.) In the decision in the last mentioned case it was said in the syllabus: "An allegation of general ownership in a petition and affidavit in replevin is not supported by the introduction of the chattel mortgage under which the plaintiff claims the right of possession of the property replevied." And further on the same point, in the body of the opinion: "There was likewise error in the ruling of the court in directing a verdict for the bank, for the obvious reason there was no evidence to show that the plaintiff was the owner of the property. At most, it had but a special interest therein by virtue of the mortgages. The *allegata et probata* did not agree; hence the plaintiff failed to make out its cause of action." It follows that the evidence in the case at bar was insufficient to warrant or sustain the verdict. A discussion of the other assignments of error is not deemed necessary. The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

CITY OF SOUTH OMAHA V. JAMES POWELL.

FILED MARCH 3, 1897. No. 7058.

1. **Instructions: EXCEPTIONS.** An exception to all of the instructions is unavailing if any one of them is correct.
2. ———: ———. Where several distinct requests to charge are denied, an exception to the refusal of all of them is insufficient, unless it appears that each should have been given.
3. ———: **ASSIGNMENTS OF ERROR.** An assignment in a motion for a new trial that a group of instructions is erroneous is bad if any one of them was properly given.
4. ———: **REPETITIONS.** A refusal of an instruction already substantially given is not error.
5. **Municipal Corporations: STREETS: NEGLIGENCE.** A city is required to exercise reasonable care and diligence in keeping a street in

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a safe condition for travel, even though the street may not be one frequently used by the public.

6. ———: UNSAFE BRIDGE: DAMAGES: JUDGMENT FOR \$2,500. Evidence examined, and *held* that the judgment is not excessive.

ERROR from the district court of Douglas county.
Tried below before OGDEN, J. *Affirmed*.

James H. Van Dusen and *E. T. Farnsworth*, for plaintiff
in error.

James Hassett and *E. M. Bartlett*, *contra*.

NORVAL, J.

In September, 1891, while the defendant below, James Powell, was crossing a bridge on F street, in the city of South Omaha, with a team and loaded wagon, the bridge collapsed, throwing him, the horses, and wagon into the creek, thereby injuring plaintiff and his team, and breaking the wagon. This action was instituted against the city to recover the damages sustained. The trial resulted in a verdict for the plaintiff in the sum of \$5,000, and he having filed a remittitur for \$2,500, a judgment was rendered in his favor for a like amount. The city has removed the record into this court for review.

The first thirteen assignments contained in the petition in error relate exclusively to the giving of certain instructions, and to the refusing of the requests to charge submitted by the city. Exception was taken in the trial court to the instructions *en masse*, those refused and also those given; therefore error cannot be predicated upon the instructions unless the entire charge was bad, or each of the requests should have been given. (*Union P. R. Co. v. Montgomery*, 49 Neb., 429, and cases there cited.) There is no claim that all the instructions given are erroneous, and where they are not, such an exception is insufficient. Again, the instructions were improperly assigned in the motion for a new trial, they being grouped in the assignments of error therein as follows:

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"1. The court erred in giving on its own motion instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 9.

"2. The court erred in refusing to give instructions Nos. 1, 2, 6, 7, 8, 9, and 10 offered by the defendant.

"3. The court erred in giving instructions 3, 4, and 5 offered by the plaintiff."

Similar assignments in motions for new trials have been held insufficient repeatedly, and that they would be considered by the appellate court to the extent alone of ascertaining if any one of the instructions was correct in each group given, and that at least one of those refused was properly denied. Counsel for the city do not claim that all the instructions given by the court on its own motion were erroneous. They offer no criticism whatever upon the first and second paragraphs of the charge, and the ninth in the same group is not contained in the record before us; therefore the first assignment must be overruled. There is no pretense that all the instructions embraced within the third assignment were erroneous, and clearly the fifth instruction given at the suggestion of the plaintiff was free from fault, which told the jury that the reasonable care and caution required of the plaintiff was that degree of care and caution which might be reasonably expected from an ordinarily prudent person under the circumstances surrounding the plaintiff at the time of the alleged injury. One, if not more, of the instructions of the defendant which was refused was in every essential particular covered by the charge of the court, hence it was not reversible error to decline to repeat the same proposition to the jury. It follows that since each assignment in the motion for a new trial is not well taken as to all the instructions referred to therein, it requires no further consideration at our hands. (*Union P. R. Co. v. Montgomery, supra.*)

The court excluded testimony offered by the city for the purpose of showing that the bridge where the accident happened was located on a street in an unfrequented and remote part of the city, over which

the travel was not so great as on other streets of the city. This ruling is now assailed. The testimony was not material. It was the duty of the defendant to keep all its streets and bridges in a reasonably safe condition for travel, whether located in one part of the city or another, and its care and diligence in respect of them are not controlled or affected by the fact that the bridge or street is less frequently used than some others within the municipality. (*City of Lincoln v. Smith*, 28 Neb., 762; *City of Ord v. Nash*, 50 Neb., 335.)

We do not see how any prejudice could have resulted from the oral remarks of the judge during the progress of the trial, or that he in the least invaded the power of the jury, and the assignment directed to that point is without merit.

Finally, it is urged that the damages are excessive. The amount found by the jury, \$5,000, was regarded by the trial judge as too large, and a remittitur of \$2,500 was ordered and filed. A perusal of the evidence satisfies us that the jury could have based a finding thereon that the plaintiff received a permanent injury; hence judgment for \$2,500 is not so excessive as to call for a reversal.

AFFIRMED.

WESTERN WHITE BRONZE COMPANY V. JOSEPH PORTREY
ET AL.

FILED MARCH 3, 1897. No. 7093.

1. **Principal and Agent: SET-OFF.** A collecting agent cannot extinguish a debt due his principal, by setting off against it his own debt, unless authorized to do so by his principal. (*McCormick v. Keith*, 8 Neb., 142.)
2. **Novation.** There can be no novation of a debt in the absence of an unqualified discharge of the original debtor by the creditor.

ERROR from the district court of Richardson county. Tried below before BUSH, J. *Reversed.*

Reavis & Reavis and *E. W. Thomas*, for plaintiff in error.

Edwin Falloon and *C. Gillespie*, *contra.*

NORVAL, J.

Plaintiff is engaged in the manufacture and sale of bronze monuments at Des Moines, Iowa. In June, 1890, plaintiff, through one Anson Rising, its soliciting agent, obtained a written order from the defendants for a monument, and afterwards, in pursuance thereof, the monument was manufactured and shipped to and received by defendants. This is a suit to recover the contract price, the defenses being payment and novation. Plaintiff was unsuccessful in the court below, and it has brought the record here for review.

The facts relied upon to establish the defense of payment are these: At the time the order for the monument was given, the said Rising, plaintiff's agent, was indebted to the defendant Portrey for rent in a sum exceeding the contract price of the monument. Subsequently, Rising, without the knowledge and consent of plaintiff, settled the account for the monument by setting off against it his debt to Portrey for rent and receipting him in full for the sum due the plaintiff. This did not amount in law to an extinguishment of the debt in controversy. The order for the monument contained this clause: "Agents are not authorized to make collections, or extend term of payments, without written orders from the company." No written authority was given Rising to settle with the defendants, or to collect the claim. Moreover, plaintiff, on the day the monument was shipped from Des Moines, notified the defendants in writing, through the mails, to "bear in mind that payment for this work must be made direct to the company, as no agent is authorized to make

collections for us, and no payment made to an agent will be recognized by the company, unless such agent can produce our special written authority." It is true there is some evidence in the record tending to prove that Rising had frequently made collections for plaintiff on orders taken by him for monuments; but this did not authorize Rising to extinguish the amount due from the defendants to plaintiff, by setting off against it his own debt to Portrey. (*McCormick v. Keith*, 8 Neb., 142.)

The defendants were no more successful in their attempt to establish a novation of the debt. Mr. Rising testified that he went to Des Moines subsequent to the delivery of the monument, and while there he saw one Johnson, plaintiff's secretary and manager, and "requested him to charge that monument to me, and he agreed to do so, and stop writing to Mr. Portrey." Mr. Johnson, by deposition, gives the following version of the same conversation: "Mr. Rising called and stated that Mr. Portrey wanted to settle with him, and requested that I give him a written order directing the defendants to pay Rising for the monument. This I declined to do, stating to him positively that the company did its own collecting and preferred to continue, our method being to collect through banks and attorneys exclusively, and paying agents by check as fast as the commissions were due them. Rising said then that he didn't want us to press Mr. Portrey for collection for he was an influential man in the community in which he lived and he wanted to use him to assist him in getting three other orders, and he said when he returned home he would remit us the money himself or make some arrangements to get it and pay us the amount due on the Portrey monument, and then asked us if we would send him a written order directing Mr. Portrey to pay the money to him, and I replied that it made no difference to us who paid us the money, and on receipt of the money we would be perfectly willing, and would send him such an order, but we would not do it before we got our money. Mr. Rising never sent us the

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money, and hence we never sent the order." It will be observed that there is a conflict in the evidence as to whether plaintiff ever agreed to charge Mr. Rising the price of the monument. But conceding that Rising's testimony is true, nevertheless it is insufficient to establish a novation. He does not pretend to say that Mr. Johnson, for and on behalf of his company, agreed to release or discharge the defendants from their obligation to pay for the monument, or to the substitution of Rising in the place of the original debtors. There can be no novation in the absence of an unqualified discharge of the original debtor by the creditor. (*Pimental v. Marques*, 109 Cal., 406; *Aldritt v. Panton*, 17 Mont., 187.)

The evidence fails to sustain the verdict. The judgment is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED. ✓

CITY OF OMAHA V. FANNIE E. RICHARDS, ADMINISTRATRIX.

FILED MARCH 3, 1897. No. 6581.

Municipal Corporations: PONDS: DEATH OF CHILD: LIABILITY OF CITY.

The former decision in this case (49 Neb., 244, 68 N. W. Rep., 528) adhered to.

REHEARING of case reported in 49 Neb., 244. *Affirmed.*

W. J. Connell and *E. J. Cornish*, for plaintiff in error.

Breckenridge & Breckenridge and *L. F. Crofoot*, *contra.*

NORVAL, J.

An opinion was handed down in this case at the last term affirming the judgment below (49 Neb., 244, 68 N.

W. Rep., 528). On application of the city a rehearing was granted, and the cause has been argued and submitted to us for determination.

It is contended that the facts developed by the undisputed testimony are different from what they were assumed or stated to be in the opinion already filed. That the direction of South Twenty-fifth street, in the city of Omaha, was incorrectly given in that opinion when filed, is conceded; but it was an immaterial error, which did not in the least degree control the conclusion reached,—an error which has been corrected in the official report of the case. We will briefly notice the alleged inaccuracies in the statement of facts in the former opinion.

The city attorney insists that plaintiff's intestate was drowned on private property, and that this court was in error when it stated there was a conflict in the evidence as to whether the drowning occurred in the street or upon premises adjacent thereto. The record reveals that some of the witnesses testified that young Weston lost his life in the water on Mr. Connell's lot, while Lewis Peterson states it as his opinion the boy was drowned in the water on the street. It escaped the attention of the writer that the further examination of the witness Peterson developed the fact that he was not in a position to have seen the accident, which point was not urged on the former hearing, else the court would not have been led to suppose the evidence was conflicting as to the exact place where Weston went down, when the witnesses competent to speak upon the subject agree that the accident happened on Mr. Connell's property, near the street. But this misconception of the evidence did not lead to the affirmance of the judgment, because the case was tried by both parties upon the theory that it made no difference whether the drowning occurred in the street or upon private property, and the city attorney requested the trial judge to so instruct the jury and the request was given. Again, it was distinctly stated in the opinion filed that "it is quite immaterial whether

he [the boy Weston] was drowned in the water in the street or on the adjacent premises, in close proximity to the street, since the negligence of the city caused the accumulation of the water, consisting of a single body extending nearly one-fourth the distance across the street to the abutting properties, and farther, that the raft containing the deceased floated from the street upon the properties abutting thereon. * * * It would have been different if the pond had been entirely upon private property, and not in close proximity to a street. In such case there would be no liability upon the city, since it would have been guilty of no breach of duty. It is undisputed that this pond of water extended into the street, and the city cannot escape liability merely because the drowning occurred upon the adjacent premises." The language just quoted shows that the conclusion then reached was in no manner influenced by the assumption that there was competent evidence to establish that the place where the boy was drowned was not on private property, but in the street.

It is also urged that the proofs were insufficient to justify the conclusion of the court on the former hearing, that the accumulation of water was occasioned by the negligence of the city in grading the street in question and constructing the storm sewer therein; but, on the contrary, that the pond was created by Connell and Clarke making a fill in the draw on their premises, thereby damming up the water. It is true that those parties filled in a portion of their lots with earth in such a manner as to constitute a dam across the draw or ravine in question a short distance below where it is crossed by South Twenty-fifth street, which caused the water coming into the ravine to back up across said street, and formed the pond in which Weston was drowned. It is likewise undisputed that the city raised the grade of the street for a portion of its width at the point where it intersects said ravine, and that the man-hole connected with the storm sewer was located west

of this embankment and near the west line of the street, and was constructed to such a height above the natural surface of the ground as to prevent the drainage of the water from the pond into the sewer. Had the manhole been properly put in, and another one, or a catch basin, had been provided near the east line of the street, connected with a drain leading into the sewer, no water would have accumulated in the street, and the sidewalk which was used by the boys as a raft would not have become detached and floated upon the water, and in all probability Weston would not have lost his life. The negligence of the city in the respect indicated contributed to the accident. It cannot escape responsibility on the ground that the embankment or dam constructed by private parties upon their own properties caused the surface water coming down the ravine to back up over the street in question. Even though the city may have had no right to go upon the lots of Connell and Clarke to remove the dam, or to drain the pond thereby formed, it could, at least, have made proper provision for the draining of the water from the street. Having failed so to do, it was guilty of negligence.

The former opinion is criticised because the only reference therein to the authorities cited by the city was the mere statement that they were not based upon similar facts to those in the case at bar. To emphasize what was then said, a brief reference to some of the cases will be made, although a review of all will not be attempted.

In *Omaha & R. V. R. Co. v. Martin*, 14 Neb., 295, the railroad company in grading its road-bed had made a deep excavation within its right of way. In the night-time, Martin, with a heavily loaded wagon, left the main traveled highway and followed some tracks in which the public had traveled, but which had not been used for several months, and in so doing drove his team into said excavation and was injured. This court held the company was not liable, inasmuch as it had been guilty of no breach of legal duty.

In *Murphy v. City of Brooklyn*, 118 N. Y., 575, a boy was drowned in an excavation on private property, about sixty feet from the street, caused by the pressure of sewerage from an adjoining sewer. The excavation was separated from the street by an embankment, faced with a wall, upon which was a fence. It was ruled that there could be no recovery against the city.

Charlebois v. Gogebie & M. R. R. Co., 91 Mich., 59, was an action to recover damages for the death of plaintiff's intestate, a boy eight years old, caused by drowning in a pond of water on defendant's right of way. The judgment of the trial court for the company was affirmed on appeal. To the same effect are *Overholt v. Veiths*, 6 S. W. Rep. [Mo.], 74; *Moran v. Pullman Palace Car Co.*, 36 S. W. Rep. [Mo.], 659. Those decisions are the same as the case of *Richards v. Connell*, 45 Neb., 467.

The syllabus of *Goeltz v. Town of Ashland*, 44 N. W. Rep. [Wis.], 770, is as follows: "In an action against a town for the death of a boy, caused by an alleged defective highway, it appeared that the town authorities had built a wagon road or bridge, twenty feet wide, guarded on both sides by a substantial railing, across a ravine, and that twenty feet north of the wagon road they had built a sidewalk, also properly guarded by rails. Between the sidewalk and the road, and from four to six feet below, there was an open space not used for travel, in which someone, without authority from the town, had dug a hole four feet deep that had become filled with water. While attempting to fill a rubber ball, and to get a drink at the hole, the boy fell into the water and was drowned. Held, that as the town had prepared a sufficiently safe track for the public travel, both for teams and footmen, it was not guilty of any negligence, and a verdict was properly directed for defendant."

The facts in *Witte v. Stifel*, 28 S. W. Rep. [Mo.], 891, are reflected by the syllabus in the following language: "Plaintiff's son, seven years old, went up to one of the cellar windows of a building in the process of construc-

tion, in a large city, which was about three feet from the street line, and tried to draw himself up by taking hold of a stone placed across the top of the window frame. The stone, not being fastened, fell and killed him. It was not shown that the owners of the building and the contractors knew of the dangerous position of the stone, or that children were in the habit of playing around the building. Held, that plaintiffs cannot recover, deceased having been a trespasser." This case would be in point if this suit was against Connell, instead of the city.

After much reflection and reinvestigation of the authorities, we are constrained to adhere to the views announced on the first hearing upon the questions of law then presented. A further discussion of them would be superfluous. Under the undisputed facts in the case the plaintiff was entitled to recover. The opinion heretofore filed is not in conflict with the decision in *Richards v. Connell*, 45 Neb., 467. The principles distinguishing the two cases are too marked to require mention here.

Attention is called to the tenth and fifteenth requests of the city to charge, which were refused, and which were not considered upon the former hearing. They are as follows:

"10. If you find from the evidence that the pond was caused by surface water accumulating on the streets and property adjacent thereto by reason of banks of earth deposited on the private property of Mr. Connell and Mr. Clarke, which prevented the free and natural flow of the surface water in that locality, then and in that case you are instructed that the defendant was not guilty of negligence in allowing said pond to accumulate, and your verdict will be for the defendant.

"15. You are instructed that the burden of proof is upon the plaintiff to prove, by a preponderance of the evidence, either that the defendant knew of the condition of the street in question, or that the said street had been in such condition on prior occasions, so as to have be-

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come of such general notoriety that the defendant is presumed to have known its condition as to becoming flooded after rain."

The first of these requests was erroneous, inasmuch as it made the case turn upon the fact whether the surface water accumulated in the street and upon the vacant property resulted from the fill of earth made by Connell and Clarke on their lots, rather than from the negligence, or the want thereof, of the city in not providing suitable drainage of the water from the street. There was no dispute that the dam caused the water to back up on the street, and had such request been given, the jury, had they followed its command, could not have escaped returning a verdict for the city. As to the other request, it was sufficiently covered by the charge of the court. The former decision is adhered to.

AFFIRMED.

JOHN D. CREIGHTON ET AL., APPELLEES, v. M. C. KEITH ET AL., IMPEADED WITH THADDEUS J. FOLEY, APPELLANT.

FILED MARCH 3, 1897. No. 7078.

1. **Review: SUPERSEDEAS.** While a supersedeas bond is not essential to obtain a review of a decree in an equity cause, such bond is indispensable to a stay of the enforcement of such decree pending the review.
2. **Res Judicata.** A judgment or decree in full force is binding upon the parties thereto, and their privies, as to the issues adjudicated.

APPEAL from the district court of Lincoln county.
Heard below before HOLCOMB, J. *Reversed.*

E. J. Hainer and T. Fulton Gantt, for appellant.

E. C. Calkins, J. B. Strode, and George E. French, *contra*.

NORVAL, J.

In July, 1888, William M. Holtry and several others formed a corporation known as the North Platte Milling & Elevator Company, having its principal place of business at North Platte, and the purposes of its organization being, among others, the buying, selling, and storing of grain and the manufacture of mill products. The articles of corporation contained this provision: "The capital stock of the company shall be seventy-five thousand (75,000) dollars, divided into shares of one hundred (100) dollars each, forty per cent of which shall be paid in on or before the 10th day of July, 1888, and the residue when called for as provided in the by-laws of the company; provided that no assessment on capital stock shall be made unless there are dividends due and unpaid on capital stock sufficient to meet such assessment, and no assessment shall be made unless authorized by a vote of three-fourths of the capital stock." Forty per cent of the amount of the entire capital stock subscribed was paid down, but no other or further payments thereon have been made. After the corporation commenced business it became indebted to John C. Creighton and others, plaintiffs herein, and to secure which it executed mortgages upon its real estate, which were foreclosed on June 15, 1891. The property was sold under decree, and deficiency judgments were rendered against the corporation, upon which executions were issued and returned wholly unsatisfied. Thereupon this suit was instituted against the original stockholders and their assignees, Thaddeus J. Foley and others, claiming that the defendants were indebted to the corporation for sixty per cent of the amount of stock subscribed, praying a decree that the defendants be required to satisfy plaintiffs' judgments. From a decree for plaintiffs the defendant Foley alone appeals.

The petition, for cause of action against Foley, alleges that on the 24th day of February, 1890, he purchased of

his co-defendant Holtry 200 shares of the capital stock of the corporation, at which time only forty per cent of the amount of said stock had been paid, and that Foley assumed and agreed to pay the remaining sixty per cent thereof. To this charge in the petition Foley, in his answer, avers that Holtry, by fraudulent and false representations, did sell, convey, and transfer to Foley the amount of stock as stated in the petition; alleges that said sale was void, and pleads a decree of the district court of Lincoln county, rendered December 29, 1891, which vacated, set aside, and annulled said transfer of stock, in an action wherein said Foley was plaintiff and said Holtry was defendant. For reply to this portion of the answer, plaintiffs allege that they were not parties to the suit wherein said decree (which is set out in full in the answer) was rendered, and "that said decree has not become final, but that the case wherein the same was rendered is now pending on appeal in the supreme court of the state of Nebraska." A demurrer to this portion of the reply was overruled.

But one of the numerous questions argued in the briefs of counsel will be noticed, and that is whether the said decree in the case of *Foley v. Holtry* is a bar to this action. It fully appears from the pleadings herein that in said suit, and prior to the bringing of this action, Foley obtained a decree against Holtry adjudging that the former, by the false representations of the latter, was induced to purchase said shares of stock, and that the court rescinded the transfer on that ground. For a report of the decision of this court affirming said decree see *Foley v. Holtry*, 43 Neb., 133. If the decree of rescission was in force at the time of the trial in the court below, and it is binding upon plaintiffs, it is a complete defense to this action, since, in contemplation of law, Foley was not a stockholder in the corporation, and, therefore, not liable for its debts. Section 675 of the Code of Civil Procedure authorizes appeals from the district court to the supreme court from final orders and decrees in all

actions in equity, if effected within six months from the rendition thereof. Section 677 declares: "No appeal in any case in equity now pending and undetermined, or which shall hereafter be brought, shall operate as a supersedeas, unless the appellant, or appellants, shall, within twenty days next after the rendition of such judgment, or decree, or the making of such final order, execute to the adverse party a bond with one or more sureties as follows:" etc. The giving of a supersedeas bond is not essential to the prosecution of an appeal in an equity cause, but is indispensable to a stay of proceedings pending a review in the appellate court. Such is the plain meaning and effect of the section above quoted, and this court has so held. (*McAusland v. Pundt*, 1 Neb., 211; *Parker v. Courtney*, 28 Neb., 605; *State v. Ramsey*, 50 Neb., 166.) In the second case, in construing section 677, it was said: "It is evident that where no supersedeas bond is filed the decree remains in full force, and that when a third party purchases property at a judicial sale, or in reliance upon the decree then in force, his rights cannot be divested by a subsequent reversal of the decree." (See Elliott, Appellate Procedure, secs. 544, 546; *Ryan v. Newcomb*, 45 Ill. App., 527, 147 Ill., 368.) The answer pleads the rendition of the decree, and the reply admits it to be true. While the reply avers that the case in which the decree was entered is pending on appeal in this court, it is not alleged that any supersedeas bond was ever given. "An appeal does not operate as a supersedeas, except as provided by statute, and upon the terms imposed by statute." (*Home Fire Ins. Co. v. Dutcher*, 48 Neb., 755; *State v. Ramsey*, 50 Neb., 166.) The reply, therefore, did not state sufficient facts to avoid the defense interposed by the answer, and the demurrer to the reply should have been sustained. The trial court found a bond was filed to stay the execution of the decree, but as such matter was not made an issue by the pleadings, the finding must be disregarded.

The appeal by Holtry in the case brought against him

by Foley did not have the effect to vacate and set aside the decree rendered therein. "If the judgment had not been appealed from it would, upon a familiar elementary principle, have so completely terminated and adjudicated all the questions embraced within the issues as to conclude the parties. The appeal does not take from the judgment its chief and much valued characteristic,—that of terminating the litigation by a final and conclusive adjudication; on the contrary, the judgment retains that characteristic and possesses that effect until reversed." (Elliott, Appellate Procedure, sec. 544.) A decree is affected by an appeal no further than that proceedings are stayed pending the review, where there has been filed a proper bond, and perhaps the decree is not admissible as evidence. In addition to the authorities already cited, see *Burton v. Burton*, 28 Ind., 342; *Burton v. Reeds*, 20 Ind., 87; *Randles v. Randles*, 67 Ind., 434; 1 Freeman, Judgments, sec. 328; *Day v. De Yonge*, 33 N. W. Rep. [Mich.], 527; *Woodbury v. Bowman*, 13 Cal., 635; *Burgess v. Hitt*, 21 Mo. App., 313; *People v. Rickert*, 159 Ill., 496; *Semple v. Eubanks*, 35 S. W. Rep. [Tex., Civ. App.], 509; *Tilley v. Washburn*, 91 Wis., 105. An appeal duly perfected, and where bond is given, strictly speaking, does not absolutely vacate the decree or judgment. If such were the case, all the appellant need do to escape the force of the judgment or decree against him would be to dismiss his appeal in the appellate court. Such dismissal does not reinstate the judgment, it merely releases the suspension of its enforcement which resulted from the appeal. We are aware that in *Minneapolis Harvester Works v. Hedges*, 11 Neb., 48, and *O'Leary v. Iskey*, 12 Neb., 137, it was said that an appeal from a justice judgment has the effect to vacate such judgment. The statement is mere *obiter*. It has been held that an appeal from a justice of the peace does not affect a lien created by the filing of the transcript of the judgment in the proper office prior to the perfecting of such appeal, except to stay the enforcement thereof. (*Dawson v. Cunning*, 50 Ill.

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App., 286.) It is a familiar principle that a judgment or decree in full force is binding upon the parties thereto and their privies as to the issues adjudicated. (*Fuller v. Brownell*, 48 Neb., 145; *Gapen v. Bretternitz*, 31 Neb., 302; *Spear v. Tidball*, 40 Neb., 107; *Brigham v. McDowell*, 19 Neb., 407.) Applying this doctrine to the case before us, the decree in the suit of *Foley v. Holtry* was a complete bar to this action. They were both parties to the litigation wherein it was adjudicated that *Foley* was induced to purchase the stock in the corporation through the false and fraudulent representation of *Holtry*, and the sale was rescinded. This decree left the parties in the same situation as if the stock had never been transferred to *Foley*. Since privies, as well as parties, are bound by a decree, plaintiffs cannot maintain the present action against *Foley*. The creditors of the corporation predicate their right to recover against him upon the fact that *Holtry* transferred to him certain shares of the capital stock which had not been paid up. They are in privity with *Holtry*, and he being bound by the decree, they are likewise equally concluded. (1 *Greenleaf*, Evidence, sec. 523; 19 *Am. & Eng. Ency. of Law*, 156; *Winfield*, Adjudged Words & Phrases, 487.) The decree herein against *Foley* is reversed, and as to him the action is dismissed.

REVERSED AND DISMISSED.

I. M. RAYMOND ET AL., APPELLEES, v. W. H. LEINBERGER & COMPANY, APPELLEE, AND WILLIAM GLOVER, APPELLANT.

FILED MARCH 3, 1897. No. 7100.

Fraudulent Conveyances: RESALE: RIGHTS OF CREDITORS. One who has taken the title of an insolvent partnership firm to real property for the purpose of disposing of such real property and paying to a creditor of said insolvent firm a part of the proceeds of the

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sale and to the firm itself the balance of such proceeds, may properly be held, in an equitable proceeding instituted against said firm and said trustee by one of its creditors, bound to pay such balance to such creditor.

APPEAL from the district court of Lancaster county.
Heard below before STRODE, J. *Affirmed.*

Hainer & Smith, for appellant.

G. M. Lambertson, H. J. Whitmore, and Darnall & Kirkpatrick, contra.

RYAN, C.

This is an appeal of William Glover from a judgment in favor of I. M. Raymond and others, rendered against him by the district court of Lancaster county. Originally, W. H. Leinberger & Co. became indebted to the partnership firm of Raymond Bros. & Co., for merchandise purchased, in the sum of \$731.90, and for this amount a judgment was rendered, on which an execution was returned *nulla bona*. This judgment formed the basis of this action against William Glover, who, it was charged in the petition in this case, with full knowledge of the insolvency of the firm of W. H. Leinberger & Co. and with the intention of defrauding the creditors of W. H. Leinberger & Co., had received a fraudulent transfer of all the real and personal property of said last named firm. The district court specially found that as to the personal property the transfer was made and received in good faith, and, as there is no appeal with respect to this finding, it must stand unquestioned. The real estate transfer was a few days subsequent to that of the personal property. With respect to this transaction the finding of the district court was as follows: "The court further finds that the said W. H. Leinberger and E. Erb [who composed the firm of W. H. Leinberger & Co.] sold their interest in a certain contract for the purchase of real estate, a house and lot in the town of Bromfield, to the defendant William Glover, and

that as the consideration therefor he agreed to pay the claim of Mrs. Garrett against the firm of W. H. Leinberger & Co., amounting to the sum of \$735, and when he [Glover] sold said real estate he was to pay an excess over and above the said claim of \$735 of Mrs. Garrett to said firm of W. H. Leinberger & Co. The court finds that the defendant [Glover] has paid the claim of Mrs. Garrett amounting to \$735; that he has sold real estate for the agreed price of \$1,500; that for the excess of \$765 over and above the claim of Mrs. Garrett, the defendant is liable for and that he has not paid or accounted for the same." The judgment was for the sum last named as hereinbefore described. It is urged that there should have been no judgment for the reason that a garnishment proceeding was adequate to reach this money, hence that a resort to equitable proceedings should not have been tolerated. It is a sufficient answer to this to say that neither in the pleading nor throughout the entire trial in the district court was this question raised. It is too late to raise it now. (*Sherwin v. Gaglhagen*, 39 Neb., 238.)

It is further urged in argument that the firm of W. H. Leinberger & Co. had transferred its right to the payment of this fund to W. V. Morse & Co., and that, therefore, the appellant Glover may be compelled to pay it twice, once under this assignment and once under the judgment in this case. As the firm of W. V. Morse & Co. is not a party to this action, and as this transfer was not pleaded in bar of plaintiffs' right of action, we cannot consider this question upon the issues joined.

It is furthermore urged that the judgment is not responsive to the prayer of the petition. In this we think counsel are mistaken, for the petition was framed upon the theory that Glover in his own wrong had obtained title to certain property, which properly should have been subject to the debts owing by W. H. Leinberger & Co., and there was a prayer that the defendant Glover accordingly should be held liable to plaintiff as creditors of W. H. Leinberger & Co. The finding of the district court upon

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sufficient evidence was that Glover had sold the property for \$1,500. As he was required to pay only the difference between that amount and the claim of Mrs. Garrett, he certainly had no cause to complain of the amount of the recovery. As he has disposed of the property so that it cannot be used for the payment of the debt due from W. H. Leinberger & Co. to plaintiffs, he cannot be heard to assert that thereby plaintiffs have been deprived of every remedy. Since Glover, as a mere trustee, has thus disposed of this property, he should be held accountable as such trustee. The finding of the district court was sustained by sufficient evidence, and, as the judgment was justified by the pleadings, it is

AFFIRMED.

**FARMERS & MERCHANTS INSURANCE COMPANY V. DELILAH
R. GRAHAM.**

FILED MARCH 3, 1897. No. 7139.

1. **Insurance: AGENTS: AGREEMENT TO PROCURE POLICY.** A mere agreement of a soliciting agent to procure to be issued a policy of insurance does not create a present liability against the insurance company, his principal.
2. ———: **AUTHORITY OF AGENT.** Proof that an insurance agent has solicited and forwarded risks and collected premiums is not such evidence as will justify an inference, against positive uncontradicted evidence, that the powers of such agent were in excess of those above indicated.
3. ———: ———: **PLEADING: EVIDENCE.** The petition examined, and held not to state a cause of action. The evidence considered and found insufficient to sustain an action even if a good cause of action had been stated in the petition.

ERROR from the district court of Lancaster county.
Tried below before STRODE, J. *Reversed.*

The opinion contains a statement of the case.

Charles E. Magoon, for plaintiff in error:

Richards did not have authority to bind the company. (1 May, Insurance [3d ed.], secs. 120, 138; *Insurance Co. v. Wilkinson*, 13 Wall. [U. S.], 222; *Eames v. Home Ins. Co.*, 94 U. S., 621; *Morse v. St. Paul Fire & Marine Ins. Co.*, 21 Minn., 407; *Armstrong v. State Ins. Co.*, 61 Ia., 212; *Insurance Co. v. Johnson*, 23 Pa. St., 72; *Constant v. Insurance Co.*, 3 Wall. [U. S. C. C.], 313; *Hackney v. Alleghany County Mutual Ins. Co.*, 4 Barr [Pa.], 185; *Dickinson County v. Mississippi Valley Ins. Co.*, 41 Ia., 286; *Critchett v. American Ins. Co.*, 53 Ia., 404; *Ayers v. Hartford Fire Ins. Co.*, 17 Ia., 176; *Security Ins. Co. v. Fay*, 22 Mich., 467; *Reynolds v. Continental Ins. Co.*, 36 Mich., 131; *Lanborn v. Fireman's Ins. Co.*, 16 Gray [Mass.], 448; *Lohnes v. Insurance Co. of North America*, 121 Mass., 439; *Bush v. Westchester Fire Ins. Co.*, 63 N. Y., 531; *Ayers v. Home Ins. Co.*, 21 Ia., 185.)

The proof fails to establish the existence of a contract of insurance. (1 Wood, Fire Insurance [2d ed.], secs. 5, 6, 15; *McCann v. Aetna Ins. Co. of Hartford*, 3 Neb., 198; *Strohn v. Hartford Fire Ins. Co.*, 37 Wis., 625; *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill., 180.)

John S. Bishop and Pound & Burr, contra:

The insurer is bound by all acts of an agent within the apparent scope of his authority. (2 Wood, Fire Insurance [2d ed.], sec. 408; *Johnson v. Milwaukee & Wyoming Investment Co.*, 49 Neb., 68; *Thompson v. Shelton*, 49 Neb., 644.)

A mere technical objection should not defeat a recovery for loss of property insured. The contract of insurance should be sustained if possible. (*Phœnix Ins. Co. v. Barnd*, 16 Neb., 90; *Springfield Fire & Marine Ins. Co. v. McLimans*, 28 Neb., 846; *Nebraska & Iowa Ins. Co. v. Christiensen*, 29 Neb., 572; *State Ins. Co. v. Schreck*, 27 Neb., 527; *Nebraska & Iowa Ins. Co. v. Silvers*, 27 Neb., 541.)

The scope of the agent's power is, under proper instructions, a question to be determined by the jury. (*Ganser v. Fireman's Fund Ins. Co.*, 38 Minn., 74; *Rivara v. Queen's*

Ins. Co., 62 Miss., 721; *Murphy v. Southern Life Ins. Co.*, 59 Tenn., 440; *Dickinson County v. Mississippi Valley Ins. Co.*, 41 Ia., 286.)

As to third parties, in absence of notice to the contrary, the agent of an insurance company must be held to possess all the powers which his occupation and dealings fairly import to the public. (*Day v. Mechanics & Traders' Ins. Co.*, 88 Mo., 325; *Phoenix Ins. Co. v. Spiers*, 87 Ky., 286; *Farnum v. Phoenix Ins. Co.*, 83 Cal., 246; *Harron v. City of London Fire Ins. Co.*, 88 Cal., 16; *California Ins. Co. v. Gracey*, 15 Colo., 70; *Zell v. Herman Farmers Mutual Ins. Co.*, 75 Wis., 521.)

A local agent having ostensible general authority to solicit applications and make contracts for insurance, and to receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority. (*Union Mutual Ins. Co. of Maine v. Wilkinson*, 13 Wall. [U. S.], 222; *Rivara v. Queen's Ins. Co.*, 62 Miss., 721; *Mississippi Valley Life Ins. Co. v. Neyland*, 9 Bush [Ky.], 430; *Western Home Ins. Co. v. Hogue*, 21 Pac. Rep. [Kan.], 641.)

RYAN, C.

In the district court of Lancaster county there was a judgment against the Farmers & Merchants Insurance Company, for the review of which these error proceedings are prosecuted. It was alleged in the petition in the district court that on November 30, 1891, plaintiff was the owner of certain household furniture in use in a house on North Thirteenth street, in the city of Lincoln; that on December 2, 1891, the defendant, the aforesaid insurance company, executed a policy of insurance on said furniture, whereby it was insured in the sum of \$1,000 against loss, from November 30, 1891, till November 30, 1894, for which insurance the plaintiff paid the required premium of \$14 to Burt W. Richards, the agent of the defendant. It was further averred in said petition that on or about June 14, 1892, the plaintiff made arrangements to pack

her household goods and move them from her dwelling on North Thirteenth street to a certain warehouse on Fourteenth and G streets, excepting the piano, which was to be removed to the residence of the above named Burt Richards, on K street, and that at said time there was an unearned premium on said policy amounting to more than \$8.40. The transaction which was claimed sufficient to create a contract to insure, and which, therefore, should, as the plaintiff claims, be held to be in effect an insurance, was in the fifth paragraph of the petition described as follows: "That on the said 14th day of June, 1892, said Richards, at request of plaintiff, came to plaintiff's house, at said number 228 North Thirteenth street, and as agent of said defendant agreed with this plaintiff to have said policy of insurance on said goods canceled, and to have made out and delivered by defendant to plaintiff another policy of insurance that would insure plaintiff against loss or damage by fire on said goods, in the sum of \$1,000, for a period of ninety days from noon on said 14th day of June, 1892, and said insurance should be seven hundred (700) dollars on all goods, excepting the piano, while stored in said storage warehouse at Twenty-fourth and G streets, and three hundred dollars (\$300) on said piano while kept at said number 1817 K street, all in said city of Lincoln, and it was further agreed that said unearned premium on said first policy of insurance should be applied on and pay the premium of said new policy to be issued to plaintiff by the defendant, and if the amount of said unearned premium was more than the amount of said premium on said new policy, the difference was to be paid to plaintiff by defendant, and if it was less, plaintiff was to pay to defendant such difference, and plaintiff then and there offered to pay same." The furniture was stored at the warehouse above indicated on June 14, 1892, and on the following day it was destroyed by fire. The judgment was for value of the said furniture.

This judgment we think should be reversed, for various

reasons, which we shall now proceed to state as briefly as possible. Burt W. Richards was the soliciting agent of the insurance company. There was no evidence introduced by the plaintiff which showed facts inconsistent with the limitation of his agency, shown by the company to be confined to soliciting insurance, taking and forwarding applications; and possibly premiums may, in some instances, have been paid to him. In the transaction under consideration, however, there was no premium paid. Indeed, the requirement of payment is apparently sought to be obviated by allegations of an agreement to cancel an existing policy and use the unearned premium thereon for a payment. But this cancellation of the policy, the above averments show, was not assumed to be within the scope of the powers of Mr. Richards. In this respect the averment was that Mr. Richards agreed to have the old policy canceled, thereby implying that this must be done by some other representative of the insurance company than Mr. Richards. As to the issuance of a new policy, the allegations of the petition were, in effect, that Richards, as agent of the company, agreed to have made out and delivered by defendant, the insurance company, to plaintiff another policy of the insurance company, which would insure plaintiff against loss or damage by fire on said goods. In *Wallingford v. Burr*, 15 Neb., 204, it was held that a contract of sale was not complete because, though while all the terms had been agreed on, there had not been made, according to the requirement of the agreement between the vendor and the vendee, a bill of sale evidencing the fact of such sale. By the very terms of the contract as pleaded in the petition a policy was required to issue to complete the contract of insurance. This requirement was never met; hence, on plaintiff's own statement of the basis of his cause of action, there was no executed contract of insurance. The reason for the rule enforced in *Wallingford v. Burr* applied to the executory contract to insure, and such a contract was not sufficient

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to render the company liable for a loss before the condition precedent was performed; that is, before a new policy had issued. In our opinion the petition failed to state a cause of action against the insurance company, and the proofs fell far short of sustaining one, even if it had been stated. The judgment of the district court is

REVERSED.

AMBROSE P. S. STUART ET AL., APPELLEES, V. HENRY BURCHAM ET AL., APPELLANTS.

FILED MARCH 3, 1897. No. 7138.

Bill of Exceptions: REVIEW: TRANSCRIPT. In the absence of a bill of exceptions, issues of fact cannot be considered in this court on appeal, even though the transcript of the pleadings and proceedings recites that the cause was originally determined on an agreed statement of facts copied in such transcript. Following *State Ins. Co. of Des Moines v. Buckstaff Bros. Mfg. Co.*, 47 Neb., 1.

APPEAL from the district court of Lancaster county.
Heard below before TIBBETS, J. *Affirmed.*

Stevens & Cochran, for appellants.

S. L. Geisthardt, contra.

RYAN, C.

The district court of Lancaster county adjudged that certain of the purchase price of lands sold by Henry Burcham should be paid by the purchaser to Ambrose P. S. Stuart and Charles Holland, as creditors of said Burcham. The wife of Henry Burcham, who unsuccessfully claimed by her cross-petition that this balance should be paid to her as a creditor of her husband, brings this case into this court for review upon appeal. The petition has been examined and found to state a cause of ac-

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tion, and a proper prayer for such relief as was decreed by the district court. The record recites that the case was determined upon an agreed statement of facts, but there is in the record no bill of exceptions; hence we are without proper evidence of the contents of the alleged statement of facts, and cannot consider issues of that nature presented by the pleadings. (*State Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 47 Neb., 1, and authorities therein cited.) The judgment of the district court is

AFFIRMED.

GUNTHER KOOPMAN V. THOMAS CARROLL ET AL.

FILED MARCH 3, 1897. No. 7122.

1. **Ejectment: SUFFICIENCY OF ANSWER.** The averments of an answer attacked by general demurrer considered and *held* sufficient to show the existence and probate of a will through which defendant claimed title.
2. **Executors and Administrators: POWERS: SALES OF LAND.** The holding of this court with reference to the power of an administrator, with the will annexed, to convey real property in accordance with powers given by such will, stated in *Schroeder v. Wilcox*, 39 Neb., 136, adhered to.

ERROR from the district court of Adams county. Tried below before BEALL, J. *Affirmed.*

The facts are stated by the commissioner.

Harwood, Ames & Pettis and *John A. Casto*, for plaintiff in error:

If the alleged will is not a will, either because it contains no apt words of bequest, or because it is not executed in the manner provided by our statute, the foreign probate does not supply or dispense with those requisites. (*Lynch v. Miller*, 54 Ia., 516; *Loving v. Pairo*, 10 Ia., 282;

Bailey v. Bailey, 8 O., 239; *Meese v. Keefe*, 10 O., 362; *Jones v. Robinson*, 17 O. St., 171; *Nelson v. Potter*, 50 N. J. Law, 324.)

The proceedings cannot be sustained unless the record affirmatively shows the jurisdictional facts, and in the absence of such showing the proceedings may be collaterally attacked. (*Gibbs v. Shaw*, 17 Wis., 197; *Dakin v. Hudson*, 6 Cow. [N. Y.], 221.)

The statutory provision that the administrator with the will annexed shall have and exercise all the power, authority, trusts, and obligations of the executor does not confer upon the administrator the power to sell real estate, even when that power is contained in the will, and conferred upon an executor by that instrument. (*Bennett v. Chapin*, 77 Mich., 526; *Conklin v. Egerton*, 21 Wend. [N. Y.], 430; *Tainter v. Clark*, 13 Met. [Mass.], 220; *Patton v. Randall*, 1 J. & W. [Eng.], 189; *Drayton v. Drayton*, 1 Desau's Eq. [S. Car.], 557; *Bentham v. Wiltshire*, 4 Mad. [Eng.], 44; *Houck v. Houck*, 5 Pa. St., 273; *Tippett v. Mize*, 30 Tex., 364; *In re Estate of Durham*, 49 Cal., 490; *Bell's Appeal*, 66 Pa. St., 498.)

Tibbets, Morey & Ferris, contra:

A will proved in a foreign country will be presumed to have been executed according to the laws thereof. The only question our courts could try would be whether such will was proved according to the laws of such foreign state. (*Goldtree v. McAllister*, 24 Pac. Rep. [Cal.], 801.)

The will, if executed according to the laws of the domicile of the testator and place where executed, will, after having been probated in this state, have the same force and effect as though executed according to the laws of this state. (*Bowen v. Johnson*, 73 Am. Dec. [R. I.], 53; *Succession of Gaines*, 14 So. Rep. [La.], 233; *Babcock v. Collins*, 61 N. W. Rep. [Minn.], 1020.)

References to question of jurisdiction: *Clow v. Plummer*, 48 N. W. Rep. [Mich.], 795; *Culbertson v. Witbeck*, 127 U. S., 327.

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The judgment of a probate court, where it has jurisdiction, finding a will valid and admitting it to probate is final and conclusive, unless reversed or modified in some of the modes prescribed by law. (*Kirk v. Bowling*, 20 Neb., 263; *Brown v. Burdick*, 25 O. St., 260; *Schell v. Husenstine*, 15 Neb., 9; *Yeatman v. Yeatman*, 35 Neb., 422.)

The will, under the statutes, gives the administrator with the will annexed power to sell real estate. (*Schroeder v. Wilcox*, 39 Neb., 136.)

M. A. Hartigan, also for defendants in error.

RYAN, C.

Plaintiff in error began this action of ejectment in the district court of Adams county. The defendants in error answered specially pleading title through *mesne* conveyances from August Ludwig Koopman, who had purchased at an auction sale made by William Steinhaus, administrator with the will annexed of the estate of Julius Koopman, through which testator both parties claim title. It was alleged in the answer that on February 16, 1879, the said Julius Koopman departed this life, leaving several heirs named; that at the time of his death, which occurred in Germany, he was seized in fee-simple of the land in controversy, situated in Adams county. The third paragraph of the answer was in this language: "That the said Julius Koopman left a last will and testament; that the same was duly probated in the proper court of Germany, and on the 6th day of October, 1879, the said last will was probated in the county court of Adams county, state of Nebraska; that William Steinhaus was appointed administrator with the will annexed of said estate, and gave bond in the penal sum of two thousand dollars (\$2,000) as such administrator. The following is a copy of the said will and proceeding relative to the probating of the same, and the bond of said administrator," etc. Following the above averments of the answer, there was set out a copy of what

appears to be the minutes of a court in Germany, showing the deposit therein of the will of Julius Koopman, and certain proceedings afterward had. One of these minutes, under date of July 5, 1876, was as follows: "Of his free will appeared the proprietor, Julius Koopman, from U. S. of A., now at Donnerschuer, and asked leave to deposit his last will in writing. As there appeared nothing against, it was granted. After which the applicant declared: 'As my heirs I proclaim,'" etc. In this instrument there were four sections, of which all the language was in the first person, singular. It was signed by Julius Koopman and by two other parties, as well as by the clerk of the court. On the 5th day of July, 1879, the minutes of the same court recite that the widow of Julius Koopman appeared and asked for publication of the last will and testament of her deceased husband, and that her request was granted. It is then recited that "the last will on record in this court under No. 103, A. D. 1876, taken from the document safe, read before the above named widow Koopman, and published at the same time. The applicant asked for a copy, the reading of which was waived." Following the above quoted language there were the minutes made when the will was deposited and the instrument above described as having been signed by Julius Koopman, followed by a certificate of translation. By the copy of what we take to be the will, for reasons hereinafter stated, it was provided that all the personal and real property of the testator in the United States should be sold at public auction after his death. As already indicated, the answer showed the defendants' title to have been derived through such a sale. There was a general demurrer to the answer, which was overruled, and plaintiff excepted. This was followed by a judgment in favor of the defendants.

It is contended that the language of the German court record shows that the testator did not file a written will, but that he made some oral declarations only, as indicated by the use of the word "declared." The demurrer

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admitted the truth of each averment of the answer, and one of these was that the will was duly probated in Germany. The word "declared" we take to mean "exhibited" or "published," and this we are strongly influenced to assume, not only because Webster gives these as equivalents of the word, but because there follows immediately what appears to be a written instrument in the first person, singular, signed by Julius Koopman and two other persons, presumably as witnesses. As the answer alleged that the will was probated in the county court of Adams county, that fact must be accepted as true, and we do not feel called upon to make the assumption that this act of the court having jurisdiction was irregular or defective.

The effect which should be accorded the execution of the power to sell land by an administrator with the will annexed was discussed in *Schroeder v. Wilcox*, 39 Neb., 136, and need not be repeated. The judgment of the district court is

AFFIRMED.

HENRY OLIVER, APPELLEE, V. JAMES F. LANSING ET AL.,
APPELLANTS.

FILED MARCH 3, 1897. No. 7094.

1. **Partition.** Where a cause is fairly within the law authorizing a partition, the right to partition is imperative and absolutely binding upon courts of equity. In such a case the right of partition is a matter of right and not of mere grace.
2. —: **DISTRIBUTION.** The mere fact that inconvenience or difficulty of making distribution, or even probable loss, is involved in making partition, in nowise affects the absolute right to have partition.
3. —: **RIGHTS OF LESSEE.** Where real property leased for a term of years is owned by several persons as tenants in common, both of the rents and the reversion, partition upon the petition of one of the tenants in common may be had, and, in case of a sale being thereby rendered necessary, the lessee will become a tenant of the purchaser of the rents and reversion.

APPEAL from the district court of Lancaster county. Heard below before STRODE, J. *Affirmed.*

Cases cited by counsel are referred to in the opinion.

Pound & Burr, J. W. Dewcese, and F. M. Hall, for appellants.

Webster, Rose & Fisherdyck, contra.

RYAN, C.

In his petition, filed in the district court of Lancaster county, Henry Oliver alleged his ownership of an undivided one-half of certain described lots in the city of Lincoln, and that the defendant, James F. Lansing, was the owner of the other half. There was described an incumbrance on the property and the plaintiff alleged that the defendant had collected certain rents and profits of the real estate which he should account for, and there was a prayer for partition, and, as an incident of such partition, for an accounting as to said rents and profits. In his answer the defendant alleged that he had fully accounted for and paid all rents and profits by him collected. Further answering, the defendant alleged that plaintiff and said defendant had built the "Lansing Opera House" on the lots described in the petition, and that prior to entering upon said enterprise the said litigants had entered into a contract with one Ed A. Church, by the terms of which they had leased to Church the said opera house for the term of five years. A copy of the contract referred to was attached to the answer, and, as it becomes necessary, will be hereinafter described. The defendant concluded his answer with the following averments: "This defendant further alleges the fact to be that the agreement between the plaintiff and this defendant was that their joint ownership and control of the building known as the 'Lansing Theater,' and their co-partnership in the building, managing, and operating the

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same, was to continue for a period of five years. This defendant further alleges the fact to be that neither the plaintiff nor this defendant are entitled to the possession of the opera house proper of said building until the expiration of said lease. And defendant further alleges the fact to be that the plaintiff is not entitled to a partition of said property until the expiration of the lease with the said Ed A. Church for a period of five years. The defendant further alleges the fact to be that the said Ed A. Church is now in possession of said property and occupying the same under and by virtue of the terms of his said lease, and is a proper party defendant to this action, and defendant therefore asks that said Ed A. Church be brought in and made a defendant in this suit, and that upon the final hearing of this action the said partition suit may be dismissed at the plaintiff's cost, and for such other and further relief as this defendant is in equity entitled to receive." There was a supplemental answer filed, by which there were merely amplifications of the above matters urged as defenses; that is to say, it was alleged that but for the consideration that the relationship established with Church was to exist for five years, the construction of the opera house would not have been contributed to, or entered upon, by the defendant. In addition to the allegations of this nature there were averments of sums expended in the common enterprise and a prayer for an accounting in respect thereto. The affirmative matters appearing in the answer were denied by plaintiff's reply. There was a decree in favor of the plaintiff that a partition should be made as prayed, and, in conformity with a finding upon an accounting, there was a judgment in plaintiff's favor in the sum of \$330.05. In the decree it was specially found, upon sufficient evidence to sustain the finding, that there was no copartnership agreement between Lansing and Oliver as to the real property partitioned, and that there was no agreement restrictive of the right of either party to a partition. By the terms of the decree it was provided that

the rights of Ed A. Church should be preserved to him, and the partition was subject to his rights under his contract with plaintiff and defendant.

The questions presented by the appeal of the defendant shall receive consideration as outlined by his answers. The contract between the parties to this action and Ed A. Church was made before the building of the opera house. Its provisions affecting this controversy were, in effect, that Church was to have the exclusive management and control of the opera house for a period of five years from the time when it would be ready for public use, during which period he was to determine for what purpose the opera house was to be used and the kind of entertainments therein to be given. The relations of Lansing and Oliver as party of the first part, and Church as party of the second part, to the agreement between said parties was defined in the following language: "Second—For his services in managing said opera house, said party of the second part shall receive five (5) per cent of the gross receipts and income of said opera house of all entertainments and performances therein, after deducting from said receipts the amount paid to the attractions showing at said house. Third—The party of the second part shall receive all income arising from said opera house, and on the day or morning next succeeding the day or night during which said opera house shall have been used or occupied for any purpose the said party of the second part shall render to the party of the first part a true account of the gross proceeds arising from the use of said opera house for the preceding day or night, and after deducting from the said sum the amount to be paid the performing company, and five per cent of the remainder thereof, he shall immediately pay the balance to the party of the first part. Fourth—All expense of stationery, correspondence, postage, telegraphing, and telephoning for the purpose of securing entertainments and performances in said opera house shall be paid by the party of the second part, and said party of the first part shall

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keep said opera house in good condition and repair. Sixth—At the expiration of the period hereby limited the party of the first part shall pay to the party of the second part the actual expense to which the party of the second part may have been in securing performances and entertainments in the future, such expense to be limited to correspondence, stationery, postage, telegraphing, and telephoning.”

The appellant insists that the appellee was not entitled to maintain an action for partition: First, on account of the relations between the plaintiff and the defendant in relation to the property; and second, on account of the relation, on the one hand, of the parties to this suit and Mr. Church, on the other hand, with respect to the subject-matter thereof. Under the first head it was urged, and probably with truth, that Mr. Lansing would never have entered into an agreement for the construction of the opera house if he had expected that inside of five years Mr. Oliver would apply to the courts for partition. It is probably true that if Mr. Oliver could have anticipated the outcome he would not have embarked in the joint enterprise. The case is one where parties with perhaps the best of intentions toward each other find that they cannot act in harmony. The question presented under such circumstances is whether, notwithstanding this unforeseen disagreement, both tenants in common must remain such for the period in contemplation when that relation was assumed between them. In support of the contention of the appellant there were cited several adjudicated cases, the aptness of which we shall now consider.

From the opinion in *Eberts v. Fisher*, 54 Mich., 294, appellant quoted these sentences: “A party may enter into such agreements with his co-tenant as to estop him from enforcing the right of partition.” “And in view of the relation of the parties to the fee and reversion it was as plainly implied that such relations should not be interfered with by partition without mutual consent.” These

independent sentences state a principle which might be utilized by appellant if the facts under consideration in the case in which they were used did not so radically differ from those involved in this case. Eberts was the owner of a vacant lot, which he leased for a term of twenty years. For the first ten years the rent was fixed at \$1,050; for the remainder of the term at \$1,200. It was provided in the lease that within the last year of the lease appraisers should be chosen, by whom the value of the lot should be appraised separate from the improvements (which improvements the lessee was bound, meantime, to place upon the lot), and thereupon the lessor might, at her option, have the improvements on payment of the appraised value at the termination of the lease. The right to exercise this option was dependent upon sixty days' notice to that effect, to be given before the termination of the lease. If no notice should be given the lease was to continue for another ten years. There was no notice given by the lessor of the option, though within the time allowed for that purpose appraisers were appointed and duly acted as such in making the appraisal. It was under this condition of affairs that the lessor sought by partition to become the owner of the improvements. The sentences quoted were used in the discussion of this attempt to violate the express provisions of the lease, and in that case were very proper, but they are not applicable to the facts of this case.

In *Avery v. Payne*, 12 Mich., 540, Payne, the owner of certain real property, entered into an agreement with Avery, his attorney, whereby Avery undertook to dispose of said property for their common benefit, subject to Payne's approval of the sales in each instance. In pursuance of this agreement Payne conveyed to Avery an undivided half interest in the real property which was the subject-matter of the contract. Avery, instead of disposing of this property, began an action for its partition, and it was held that under the circumstances partition had been improperly made by the inferior court.

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In *Peck v. Cardwell*, 2 Beav. [Eng.], 137, four persons purchased land under an agreement that it should be laid out in streets and sold in lots, according to a specified plan. All the parties died. The purchase money had all been advanced by two of the four persons indicated, in whose favor mortgages had been made by the other two on their respective interests. One of these mortgagors made the two mortgagees and another person his executors and trustees, giving them power to sell, but not to make purchases. It was held that as between the representatives of the deceased persons there could be no partition, because the parties were not mere tenants in common of land as to portions of which some were entitled partly as trustees and partly for their own benefit.

In *Coleman v. Coleman*, 19 Pa. St., 100, land containing iron ore was held in common by two persons, and the heirs of another, a former owner. By the said two persons and the guardian of the minors who were owners of an interest it was agreed in writing, under seal, that certain persons named should make partition of a part of the property, but that the ore banks should remain as an undivided tenancy in common, and that none of the parties should interfere with or interrupt the others at any mine hole by them opened and occupied for the purpose of raising iron ore. In amicable actions of partition the furnaces and forges were allotted, but as to the iron ore banks and hills it was recommended that they should still remain undivided. The report containing this recommendation was duly confirmed by the court in 1787, and each party took possession of the parcel assigned him and himself, or those claiming under him, continued to hold the same until 1851, when suit was brought for the partition of the land on which was situated the ore bed. It was held that the agreement was a defense, not only on account of the judgment by which it had been ratified, but because the covenant ran with the land, if not for the purpose of enabling an heir or assignee to sue, at least for that of rebutting a suit brought in derogation

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of the restraint which it imposed. The partition was held not permissible, because the partition previously had, had been in effect of profits of the mine hills, for the soil was of no value. The ore was the object to be secured, and the partition of this was impracticable, for no one could say how it was distributed. For the reason that the value of the several parts of an ore bed was not ascertainable, it was held in *Conant v. Smith*, 1 Aikin [Vt.], 67, that it was not apportionable, and that under such circumstances resort should be had to a court of chancery for a decree which would authorize its sale as an entirety and the apportionment of the proceeds.

Just how far the case of *Haughton v. Callahan*, 3 Wash., 158, falls short of justifying appellant's contention is illustrated by the first paragraph of the syllabus, which is in the following language: "Where, by agreement between plaintiff and the defendant, certain land upon which plaintiff held an option was to be purchased and paid for by the defendant and deeded to the latter in his own name, the profits of the transaction, after refunding purchase money and interest, to be equally divided between them, the defendant is entitled to hold the land until it has all been sold to third parties, and the plaintiff has not such an interest in the land as to entitle her to a partition thereof, but can claim only an equal share of the profits from its sale."

In *Baldwin v. Humphrey*, 44 N. Y., 609, certain persons as trustees received a conveyance of real property, and it was held that no partition of it could be had, for a division of the property necessarily involved a breach of trust.

In *Anderson School Township v. Milroy Lodge*, 130 Ind., 108, partition was sought of a house of which the three different stories were owned by distinct individuals, and it was held that the relief prayed must be denied, for it necessitated the cutting off of the means of access to the two stories above the ground; moreover, it was held as consistent with the same theory that the house was as

completely partitioned as in its nature it was possible to make partition of it.

Appeal of H. B. Latshaw, 122 Pa. St., 142, involved the same principle as was involved in *Baldwin v. Humphrey*, *supra*, and this principle is thus stated in the syllabus: "Ordinarily when a deed is made to trustees for a church or other charity the fee vests at once in the association, for, the trust being raised only for the purpose of taking and passing title, it is immediately executed; but not so where the trust is active and continuing, as where it is created for the support of a special use."

In *Story v. Palmer*, 46 N. J. Eq., 1, the reason why partition would not lie was indicated by the language of the syllabus: "A court of equity will not decree a partition urged by one *cestui que trust*, and resisted by another, where its effect will be to override and put an end to an active trust and thus defeat the testator's intention, if the trustees stand ready to execute the trust in good faith." It was said, furthermore, that if the trustees refused to perform they could be compelled to do so by a court of equity.

In *Brown v. Lutheran Church*, 23 Pa. St., 495, trustees of real estate for educational and religious purposes, it was held, could not create a new use or convey the estate for purposes inconsistent with those for which they held it. A burying ground being a part of the property held in trust for the use of two societies, it was held, should not be partitioned, for it could not properly be divided by lines, and to sell it to be used for ordinary purposes would be repugnant to every sense of decent propriety.

The case of *Hill v. Reno*, 112 Ill., 154, was cited by appellant, and in its syllabus we find the rules laid down as follows: "Where a case is fairly brought within the law authorizing a partition, the right to partition is imperative and absolutely binding upon courts of equity. They are not clothed with such discretion as that, under a given state of facts, they may grant the relief or refuse it and yet commit no error. To invoke this equitable

remedy is a matter of right, and not of mere grace." In the fifth paragraph of the same syllabus it is said: "In the event that a partition could be effected only through the instrumentality of a sale of the premises and a distribution of the proceeds of such sale among the several parties in interest, the mere fact that difficulties may arise in the adjustment of the distribution, or inconvenience, or even possible losses, result from the change of the relation of the parties to the estate by reason of the sale, will in no way affect the absolute right to have partition." The consensus of most of the cases cited by appellant cannot be better stated than was done in this case, and, therefore, assuming that appellant's counsel have cited it because of that fact, we shall quote therefrom this language: "Notwithstanding the rule as stated [in effect as in the above quotation from the syllabus] is almost universally conceded, nevertheless, there are certain well recognized modifications of it. For instance, if an estate should be devised or conveyed, to two or more, upon the express condition that it should not be subject to partition, or if several tenants in common, or joint tenants, should covenant between themselves that the estate should be held and enjoyed in common only, equity would not, in the absence of special equities, award a partition at the suit of some of the parties, against the objections of the others; and where the title of the complainant is doubtful, or, in other words, where he does not show a clear right to partition, it will not be awarded. So where several persons have purchased land with a view of selling it out into lots for building ground, according to a certain plan, and it was agreed among them that neither of them should dispose of his share, except in a certain manner, it was held, in a suit by the representatives of one of the parties against the survivors, that the agreement barred the right to partition. (*Peck v. Cardwell*, 2 Beav. [Eng.], 137. See, also, in this connection, *Cubbage v. Franklin*, 62 Mo., 364; *Selden v. Vermilya*, 2 Sandf. [N. Y.], 568.) The principle which seems to underlie all

these cases is that equity will not award a partition at the suit of one in violation of his own agreement, or in violation of a condition or restriction imposed upon the estate by one through whom he claims. The objection to partition in such cases is in the nature of an estoppel." This quotation leaves out of consideration the class of cases wherein partition has been denied of ore beds, but as there is nothing of this nature in this case, the omission is of little practical consequence. There has been neither pleaded nor shown an express condition of limitation by contract. There is just as complete a failure to disclose any trust which would be violated by awarding partition. It was said in the case of *Hill v. Reno*, *supra*, that mere hardship would not be sufficient to prevent resort to partition, for partition is a matter of right, and these propositions are abundantly sustained by the books. (Freeman, Cotenancy & Partition, sec. 433; *Smith v. Smith*, 10 Paige Ch. [N. Y.], 470; *Howey v. Goings*, 13 Ill., 95; *Parker v. Gerard*, 1 Amb. [Eng.], 236; *Holmes v. Holmes*, 2 Jones Eq. [N. Car.], 334; *Stedman v. Weeks*, 2 Strob. Eq. [S. Car.], 145; *Wisley v. Findley*, 3 Randolph [Va.], 261.)

It seems, however, that the appellant, to some extent, bases his opposition to the right of appellee to partition upon the assumption that there was a partnership between plaintiff and defendant in respect to the building and management of the opera house. There is not found in the record any evidence of a partnership relation, and the district court found specially that no such relation existed. If there had been a partnership, that fact alone would not have been sufficient reason for denying partition. (*Collins v. Dickinson*, Hayw. 2d ed. [N. Car.], 275; *Hughes v. Devlin*, 23 Cal., 502.) We conclude from a full consideration of the citations made on behalf of both litigants, and from such independent research as we have been able to make with reference to this proposition, that the relations of the plaintiff and defendant to the opera house, and between themselves, were not such as would serve to modify the generally accepted rule that

partition between tenants in common is the absolute right of either tenant.

We shall now consider the relations of the appellant and appellee towards the opera house property as affected by their contract with Mr. Church. By the appellant it is insisted that his contract was one of lease, therefore that the right of possession during the term is solely in Mr. Church, from which consideration it is claimed necessarily to result that no partition can be had between Mr. Oliver and Mr. Lansing, because neither of them is in possession. It may, for the purposes of this investigation, be conceded that Mr. Church, for the term of five years, has the right of exclusive possession of the opera house. This being thus conceded, let us consider the citations of appellant directed to the deduction that therefore partition cannot be maintained. The first case cited is that of *Hunnewell v. Taylor*, 6 Cush. [Mass.], 472, but this is of little value, for the court was governed by a provision of the statutes of Massachusetts that a petition for partition "may be maintained by any person who has an estate in possession, but not by one who has only a reversion or a remainder." In *Tabler v. Wiseman*, 2 O. St., 207, it was held as long as there was in existence the widow's dower right, the heirs could not partition their interests, because no right of present possession existed in their favor. These cases are all that tend to sustain the contention of the appellant,—the latter quite directly so. As opposed to this contention we shall now review other cases which seem quite in point.

In Illinois the statute provides for partition on the petition of any one or more of the persons interested; and that the petition shall set forth the rights and titles of the parties in interest, including tenants for years, for life, by courtesy, or in dower, and of persons entitled to the remainder or reversion. It was held that as this statute contained nothing requiring that the applicant should have an estate entitling him to be in possession, and as it clearly contemplated bringing before the court

the owner of the life estate, it must be construed as authorizing a reversioner or remainder-man to maintain a suit for partition against the owner of the remaining undivided interest in reversion or remainder, although the whole premises were subject to an unexpired life estate. (*Scoville v. Hilliard*, 48 Ill., 453; *Hilliard v. Scoville*, 52 Ill., 449.)

A like construction was given a similar statute in Minnesota in a case where the possession was held by a lessee. (*Cook v. Webb*, 19 Minn., 167.)

In New Jersey partition may be had among remaindermen. (*Smith v. Gaines*, 38 N. J. Eq., 65.)

In *Phillips v. Johnson*, 14 B. Mon. [Ky.], 172, the real property had been subject to the life estate of Mrs. Stanford. Partition between the heirs, after her death, was resisted by one who claimed possession under a lease from her and insisted that no partition could be had until his possession had been legally terminated. Referring to the rights of the heirs, Marshall, J., used this language: "To say that the chancellor is ousted of his ordinary jurisdiction to make partition between the parties thus entitled, and must send them to a court of law to establish their title and get possession because the tenant in possession, though by his own showing he holds under their title, and is bound to surrender to it, says the land is his, that he claims and holds adversely, and that he cannot be ousted but by the verdict of a jury, would be to subject an important and beneficial jurisdiction to the mere ignorance or perversity of the tenant in possession, and to allow the substantial ends of justice to be defeated by a shadow of technicality."

In *Hunt v. Hazelton*, 5 N. H., 216, on a petition for partition, where the petitioner alleged that he was seized in fee as a tenant in common with the respondents, it was held that a plea alleging that one of the respondents had a lease of the interest of the petitioner for a term of years, which had not expired, was no answer to the petition.

In *Woodworth v. Campbell*, 5 Paige Ch. [N. Y.], 518, the syllabus was as follows: "Where lands leased for a term of years are owned by several persons as tenants in common, both of rents and of the reversion, a bill for partition may be sustained; but a sale of the lands under the decree in partition must be made, subject to the rights of the lessees, who by the sale will become the tenants to the purchaser of the rents and reversion."

It is probable that the requirements of the rule as to possession to sustain partition is stated as favorably as possible to appellant in section 446 of Freeman, Cotenancy & Partition, as follows: "It is a general rule, prevailing in England without exception, and also throughout the majority of the United States, that no person has the right to demand any court to enforce a compulsory partition unless he has an estate in possession—one by virtue of which he is entitled to enjoy the present rents or possession of the property as one of the cotenants thereof."

Section 802 of the Code of Civil Procedure is in the following language: "When the object of the action is to effect the partition of real property among several joint owners, the petition must describe the property, and the respective interests and estates of the several owners thereof, if known. All tenants in common or joint tenants of any estates in land may be compelled to make or suffer partition of such estate or estates in the manner hereafter prescribed."

The conclusion reached by the courts, respectively, in *Scoville v. Hilliard*, *supra*, and *Cook v. Webb*, *supra*, was in each instance influenced by a statute much resembling our own, and it is our conclusion therefrom, and from the other cases above cited, on general principles, independent of statute, that there was properly a partition awarded between appellant and appellee notwithstanding their contract with Ed A. Church.

The finding of the court as to the condition of the accounts between the appellant and appellee, in view of the

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great number of items and of the interest which might properly be allowed, was as nearly correct as could be expected. We have examined these items sufficiently to be satisfied that no injury had been done Mr. Lansing, and we do not feel called upon to make a more critical analysis, merely to be able to state this fact with mathematical exactness. The judgment of the district court is in all things

AFFIRMED.

CITY OF HASTINGS V. ARTIE L. MILLS.

FILED MARCH 3, 1897. No. 7163.

1. **Costs: ACTION AGAINST CITY: DAMAGES.** Mills sued the city in the district court claiming \$5,000 damages which he alleged he had sustained by falling into an excavation in one of its streets negligently left unguarded. He recovered a verdict for \$200. *Held*, (1) That, assuming the excavation was a nuisance within the meaning of section 621 of the Code of Civil Procedure, a justice of the peace had jurisdiction to render judgment for the amount of the verdict and therefore Mills was not entitled to recover costs; (2) that the amount claimed by Mills in his petition deprived a justice of the peace of jurisdiction to try the case but the amount recovered determined his right to recover costs.
2. ———. The right of a litigant to recover costs is a statutory, not a common-law, right.

ERROR from the district court of Adams county. Tried below before BEALL, J. *Reversed*.

A. H. Bowen, for plaintiff in error.

C. H. Tanner, *contra*.

RAGAN, C.

In the district court of Adams county Artie L. Mills, by his next friend, sued the city of Hastings for damages for an injury which he alleged he had sustained by falling

into an excavation in one of the streets of said city, negligently permitted by it to remain unguarded. He had a verdict and judgment for \$200. Thereupon the city moved the court for an order to tax it with only its costs, and not with the costs made by Mills. This motion the district court overruled and permitted Mills to recover from the city the costs expended by him in the action. To reverse this order the city prosecutes here a petition in error.

Section 621 of the Code of Civil Procedure is as follows: "If it shall appear that a justice of the peace has jurisdiction of an action, and the same has been brought in any other court, the plaintiff shall not recover costs; and in all actions for libel, slander, malicious prosecution, assault, assault and battery, false imprisonment, criminal conversation, seduction and actions for nuisance, or against a justice of the peace for misconduct in office, if the damages assessed be under five dollars the plaintiff shall not recover any costs." The contention of the city is that a justice of the peace had jurisdiction of this action, and, therefore, it is not liable for the costs expended by Mills in prosecuting the action. The contention of Mills is that his is an "action for nuisance," within the meaning of said section of the Code, and that a justice of the peace had not jurisdiction thereof, and that if he had recovered only \$5 he would have been entitled to recover costs. We assume, for the purposes of this case only, that the unguarded excavation left in its street by the city was a nuisance, and that the action at bar is an "action for nuisance,"—that is, an action arising out of and caused by such nuisance,—and proceed to the inquiry as to whether a justice of the peace has jurisdiction of such action. Section 18, article 6, of the constitution provides: "Justices of the peace * * * shall * * * have and exercise such jurisdiction as may be provided by law; *Provided*, That no justice of the peace shall have jurisdiction of any civil case where the amount in controversy shall exceed two hundred dollars, nor in a criminal

case where the punishment may exceed three months' imprisonment or a fine of over one hundred dollars, or in any manner wherein the title or boundaries of land may be in dispute." It will thus be seen that, subject to the limitations named in said section, the constitution has left it to the legislature to say over what subjects and actions a justice of the peace shall have jurisdiction. Section 905 of the Code of Civil Procedure, adopted in 1866, enumerates ten subjects within the jurisdiction of justices of the peace; and section 906 of the Code adopted in 1881 gave justices of the peace jurisdiction in actions for trespass to real estate where the damages demanded did not exceed \$200; and section 1103 of the Code adopted in 1881 provided: "Justices of the peace shall have jurisdiction in all cases where the sum in question does not exceed \$200, except in cases limited in this title." The limitations alluded to are found in section 907 of the Code, which provides that a justice of the peace shall not have jurisdiction to recover damages for an assault, an assault and battery, malicious prosecution, actions against justices of the peace or other officers for misconduct in office, for slander, verbal or written, on contracts for real estate, nor in actions in which the title to real estate is sought to be recovered or may be drawn in question.

Reading the constitution and the sections of the Code just quoted together, it appears that justices of the peace have jurisdiction of the subject-matter of all civil cases where the sum in question does not exceed \$200, except in actions the subject-matter of which are expressly named in section 907 of the Code; and we conclude, therefore, that a justice of the peace has jurisdiction of an action brought by one to recover damages which he alleges he has sustained as the result of a city maintaining or permitting to exist in its streets a nuisance, where the amount of damages claimed does not exceed \$200. The amount claimed by the plaintiff in his petition determines, in the first instance, whether a justice of the peace has jurisdiction of the action; and if a plaintiff claims more

than \$200 he cannot bring his action before a justice of the peace; but jurisdiction must not be confounded with right to recover costs. Jurisdiction is the authority to hear and decide. The right of a litigant to recover costs is not a common-law right, but a statutory one, and while the amount claimed determines what court has jurisdiction, the amount recovered determines the plaintiff's right to costs. The meaning of section 621 of the Code is not that if a plaintiff claims more than \$200 he may thereby oust the justice of the peace of jurisdiction of the case and still recover his costs in some other court, if his recovery be within the jurisdiction of the justice. He may claim in his petition what he pleases and thereby oust the justice of the peace of jurisdiction to try the case, but if his recovery is within the jurisdiction of the justice the statute does not award him costs. (See *Geere v. Sweet*, 2 Neb., 78; *Beach v. Cramer*, 5 Neb., 98; *Ray v. Mason*, 6 Neb., 101; *Martin v. Grover*, 9 Neb., 263; *Miller v. Roby*, 9 Neb., 471; *Moore v. Darrow*, 11 Neb., 462; *Wilde v. Boldt*, 16 Neb., 539; *Goodman v. Pence*, 21 Neb., 459.)

We must not be understood as deciding whether or not a justice of the peace has the jurisdiction to abate a nuisance. This is not such an action. The provisions of section 1103 of the Civil Code are very broad, and it may be that a justice of the peace has now jurisdiction in civil actions for false imprisonment, criminal conversation, seduction, and actions for nuisance where the amount of damages claimed does not exceed \$200. But whether a justice has such jurisdiction is not presented by this record and not decided. The order of the district court is reversed and the cause remanded with instructions to tax the costs made by Mills to him.

REVERSED AND REMANDED.

FRANK W. KETTENBACH, ADMINISTRATOR, v. OMAHA
LIFE ASSOCIATION ET AL.

FILED MARCH 3, 1897. No. 6956.

Life Insurance: WARRANTIES: REPRESENTATIONS: CONSTRUCTION.

MOTION for rehearing of case reported in 49 Neb., 842.
Motion overruled.

Byron G. Burbank, for the motion.

RAGAN, C.

The defense of the insurance company to this action proceeded upon two theories: (1) That the statements made by the assured in his application were warranties; and (2) that if the statements made were representations they were false. In the opinion filed in the case we held that the statements of the assured in the application were representations, and not warranties, and that in order for the falsity of the representations made by the assured to constitute a defense to the action it was incumbent upon the insurance company to plead and prove that the statements and answers alleged to have been made by the assured in his application were actually made by him as therein written; that these statements were false; that they were false in some particular material to the insurance risk; and that the insurance company relied and acted upon such statements.

After a re-examination of the case we adhere to all the propositions of law already announced. But the insurance company claims that it is entitled to a rehearing, for the reason that there was no question of fact which the district court should have submitted to the jury. For the purposes of this motion, and this motion only, we assume that the assured made the statements and answers written in his application; that some of these state-

ments were false; that they were false in some particular material to the insurance risk; and proceed to inquire whether the undisputed evidence in the record discloses that the insurance company relied and acted upon such representations. The insurance company, in its answer filed in the district court, alleges: "That if said William F. Kettenbach had informed this defendant * * * that he was afflicted with or had symptoms of exophthalmic goiter or impotency, and was subject to jaundice, bleeding piles, or other diseases, this defendant * * * would not have entered into said contract of insurance." This is not an affirmative plea, on the part of the insurance company, that the assured made a representation that he was not afflicted with any of the diseases named, and that such representation was false, and that the insurance company believed the representation made to be true and in consequence thereof issued the policy in suit. Assuming, however, that the plea is sufficient, does the uncontradicted evidence support it? It appears from the record that one Esmond was secretary, one Bechtel president, and one Dr. Knode was the medical director of this insurance company at the time the policy in suit was issued; that these three gentlemen constituted the executive board, or the examining board. Mr. Esmond testified that he examined the application of the assured and relied upon it. Mr. Bechtel testified that he examined the application and relied upon it. It also appears that the insurance company caused the assured to be examined by a Dr. Kelley, who was an agent or employe of this insurance company for that purpose. Dr. Kelley made his examination of the assured, and it appears in full as a part of the assured's written application and bears date the day after that application was signed. In this application Dr. Kelley certified that he had made a personal private examination of the assured, and he gave his opinion that the assured would survive the term of his expectancy of life; that he had discovered nothing in the assured which affected the risk; that he believed

him to be safely insurable, and that, after reviewing the assured's state of health, he considered the risk first class. This report of Dr. Kelley is very full and very minute. It sets out the color of the hair, eyes, and skin of the assured; gives his complexion; describes his figure; states that he had a sanguine temperament; gives the rate of his pulse per minute, standing and sitting; the volume of his pulse; states that it is regular; gives the number of his respirations per minute; gives the circumference of his chest during a forced expiration, tranquil respiration, and forced inspiration; describes the action of his heart as being uniform, free, and steady; states the appearance of his tongue, and states other facts concerning the organs of the assured and their functions and the condition of the assured's health that he could not have given had he not made, as he stated, a careful and private examination of him. Mr. Esmond and Mr. Bechtel both testified that while they relied upon the application of the assured, they also examined this report of Dr. Kelley, and that they as implicitly relied upon that as they did upon the application of the assured. But this is not all. Mr. Bechtel testified for the insurance company that if the application of the assured had disclosed that he had been afflicted with piles or impotency, that the insurance would not have been refused necessarily for that reason if it appeared that he had recovered; or in any event, that the company would have been governed in the premises by the advice of Dr. Knode, its medical adviser. The evidence does not show that this examination board, as such, ever examined or passed upon the application made by the assured; nor does it show that the medical examiner of this company ever saw this application or this report of Dr. Kelley; he was not called as a witness. We conclude, therefore, that if it be assumed that the assured made false representations in his application, and if it be assumed that the insurance company has, by its pleading, put the making and reliance upon these false representations in issue,

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still the district court had no right to decide the question at issue, whether the insurance company relied upon these representations, and because of its reliance thereon issued the policy in suit. That was a question for the jury to determine, and the district court invaded the province of the jury when it took that question from it. The motion for rehearing is overruled.

REHEARING DENIED.

GEORGE W. SCOTT V. JOHANNA C. WRIGHT ET AL.

FILED MARCH 3, 1897. No. 7107

1. **Judgment: PROCEEDING TO VACATE.** A judgment suffered because of the negligence of counsel employed is not the result of unavoidable casualty or misfortune within the meaning of subdivision 7, section 602, of the Code of Civil Procedure.
2. ———: ———. In a suit in ejectment against a married woman and her husband, judgment was rendered for the plaintiff. After the adjournment of the term at which judgment was rendered the wife filed a petition to vacate it, alleging that she depended entirely upon her husband to conduct the defense of the ejectment suit; that at the time of the rendition of the judgment he was sick and unable to be in attendance in court, and the judgment was rendered in his absence and in the absence of all persons interested in the defense; that her husband willfully betrayed her and deprived her of an opportunity to appear and make a defense to the ejectment suit. *Held*, (1) That the averments of the petition did not show that the wife had been prevented from defending the ejectment suit by an unavoidable casualty or misfortune within the meaning of said section 602 of the Code; (2) that the facts averred in the petition were not sufficient to authorize the district court in the exercise of its general equity jurisdiction to set aside the judgment in the ejectment case.

ERROR from the district court of Douglas county.
Tried below before SCOTT, J. *Reversed*.

Saunders & Macfarland, for plaintiff in error.

Andrew Bevins, *contra*.

RAGAN, C.

In the district court of Douglas county, George W. Scott brought a suit in ejectment against Johanna C. Wright and Luther R. Wright. The parties made defendants appeared and answered and judgment was rendered against them. After the adjournment of the term at which such judgment was rendered, Johanna C. Wright filed a petition against Scott to vacate the judgment rendered against her in the ejectment suit. To this petition Scott interposed a general demurrer, which was overruled and the judgment vacated, and from this order Scott has prosecuted an error proceeding.

The petition of Mrs. Wright sets forth facts which constitute a meritorious defense to the action of ejectment. In her petition she also avers that at the time of the rendition of such judgment she was a married woman, the wife of her co-defendant in the ejectment suit, Luther R. Wright; that she depended entirely upon him to manage and conduct the defense of the ejectment suit, and to inform her whenever any proceedings were to be had or her presence or evidence were required in the action; that at the time of the rendition of the judgment her husband "was sick and unable to be in attendance in court or present at such trial, and said judgment was rendered in his absence and in the absence of all persons interested in the defense to said action;" that she did not know that a trial had been had and a judgment rendered in the ejectment suit until after the adjournment of the term in which such judgment was rendered; that after the rendition of such judgment, and after the recovery of said Luther R. Wright from such sickness, he willfully and wrongfully withheld from his wife all knowledge that any proceedings had been had in such action, until too late to file a motion to set such judgment aside.

Do the facts averred in this petition show that Mrs. Wright was prevented from defending the ejectment suit by unavoidable casualty or misfortune, within the mean-

ing of the seventh subdivision of section 602 of the Code? The district court seems to have been of opinion that the sickness of Mrs. Wright's husband on the day of the trial of the ejectment suit was an unavoidable casualty or misfortune within the meaning of the Code. The failure of counsel employed to be present at the trial of a case on account of sickness has sometimes been held such an unavoidable casualty or misfortune as entitles the party suffering the judgment to have it vacated. Such is *Bristor v. Galvin*, 62 Ind., 352. In *Town of Omro v. Ward*, 19 Wis., 249, the case was set for trial on the 22d of December. On the 21st of that month the attorney employed took the train for the place of trial and in time to reach there in the evening of the 21st; but by reason of a wreck or accident upon the road the counsel did not reach the court room until after the judgment had been rendered, on the 22d. The court held that this was such an unavoidable casualty or misfortune as entitled the party suffering the judgment to have it vacated. But in the case at bar the petition of Mrs. Wright does not allege when her husband and attorney first became sick, nor the nature of his sickness,—whether it was of such a character as to affect his mind and deprive him of the power to give directions concerning the pending ejectment suit, nor does she allege how long his sickness continued,—whether he recovered in time to have filed a motion to vacate the judgment during the term at which it was rendered; nor does the petition allege when the term of court at which the ejectment judgment was rendered finally adjourned.

If it be conceded that the sickness of counsel on the day of trial is an unavoidable casualty or misfortune within the meaning of the statute, the facts averred in the petition do not disclose that the judgment in ejectment against Mrs. Wright was the result of such casualty or misfortune; nor do they show that, by reason of the sickness of her husband on the day of trial, she was deprived of an opportunity to file a motion to vacate the

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judgment in ejectment during the term at which it was rendered. Though the husband may have been sick on the day of trial and unable to be present in court, still, from anything that appears in the petition, this sickness may have begun long before the trial. The sickness of her counsel was known to Mrs. Wright, and she may have had opportunity to employ other counsel; and from anything that appears in the petition her husband recovered from his illness during the term at which the judgment was rendered, and in sufficient time to have filed a motion to set it aside; and it does not appear from the petition that during all his sickness he was unable to communicate with her in reference to the pending suit or judgment and afford her an opportunity to employ other counsel to look after it; nor does it appear from the petition that the sickness of the husband was of such a character as to require the wife's attendance upon him at the day of the trial. A careful analysis of this petition discloses that this ejectment judgment against Mrs. Wright was the result of the negligence of her husband. A client who employs counsel to defend a suit is responsible for his negligence or other acts, which do not amount to a fraud, and a judgment suffered because of the negligence of counsel employed is not the result of unavoidable casualty or misfortune within the meaning of the statute. (*Ganzer v. Schiffbauer*, 40 Neb., 633.) The facts averred in the petition do not bring the plaintiff within the provisions of section 602 of the Code of Civil Procedure. The district courts of the state, by virtue of their general equity jurisdiction, may vacate a judgment after the term at which it was rendered for causes not specified in section 602 of the Code. But the facts averred in the petition in the case at bar are not sufficient to authorize the district court, in the exercise of its general equity jurisdiction, to set aside the judgment in the ejectment suit. It is true that Mrs. Wright, in the petition, avers that her husband willfully betrayed her and deprived her of an opportunity to appear and

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make a defense to the ejectment suit, but this is a mere conclusion. No facts are stated. The decree appealed from is reversed and the cause remanded, with instructions to the district court to sustain the demurrer of the appellant.

REVERSED AND REMANDED.

NORTH PLATTE WATER-WORKS COMPANY V. CITY OF
NORTH PLATTE.

FILED MARCH 3, 1897. No. 7470.

1. **Review: PRINTED ABSTRACT: TRANSCRIPT.** The supreme court cannot for any purpose look into the record certified here by the clerk of the district court when the case under review has been submitted on a printed abstract in pursuance of its rules.
2. **Municipal Corporations: WATER-WORKS: CONTRACTS.** The city council of the city of North Platte, in July, 1887, by virtue of subdivision 15, section 69, chapter 14, Compiled Statutes, 1887, was authorized to contract with a corporation to erect and maintain within the limits of said city a system of water-works and supply said city and its inhabitants with water; and to levy annually, on all the taxable property of said city, a tax of seven mills on the dollar to pay for the water furnished said city under such contract.
3. ———: **ACTION FOR WATER RENTS: PLEADING.** In a suit against said city to recover water rents alleged to be due upon such a contract it is not necessary for the plaintiff to plead such statute.
4. ———: **WATER RENTS: TAXATION.** If the revenue derived in any one year from a seven-mill levy should prove insufficient to pay the water rental accruing in said year under such a contract, whether the city would be liable for such deficiency not decided.
5. ———: ———: **PLEADING.** *Held*, That the petition in the case at bar states a cause of action.

ERROR from the district court of Lincoln county. Tried below before NEVILLE, J. *Reversed*.

Wilcox & Halligan and Marston & Marston, for plaintiff in error.

French & Baldwin, contra.

RAGAN, C.

The North Platte Water-Works Company, hereinafter called the "water company," in the district court of Lincoln county, sued the city of North Platte to recover a sum of money which it alleged was due it from the city for hydrant rentals. To the petition of the water company the city interposed a general demurrer, which was by the court sustained and the petition of the water company dismissed. To reverse this judgment of the district court the water company has prosecuted here a petition in error.

1. The case has been advanced under rule 2 of this court and submitted to us on a printed abstract of the record. The sole question presented is whether the petition of the water company states a cause of action. The petition quoted in the abstract alleges: "That the water company is a private corporation and the city a municipal corporation of the state; that on the 14th day of July, 1887, the city and the water company entered into a contract in and by which the water company was to construct in said city a system of water-works and operate the same, and to rent to the city forty-five hydrants for twenty years, for which the city was to pay an annual rental of \$65, payable in January and July of each year; that the water company constructed its water-works and the city accepted the same, and that the water company had since maintained and operated its works in accordance with the terms of its contract with the city; that in the year 1889, at the request of the city, the water company extended its mains and placed thereon six additional fire hydrants, for which the city agreed to pay an annual rental of \$40 each, payable semi-annually on the first days of January and July of each year; that there is due the plaintiff from the defendant, and unpaid, under the terms of said contract, the sum of \$4,235.43, with interest from July 1, 1893, at seven per cent; that the assessed valuation of the taxable prop-

erty of said city in 1886 was \$410,548.69, and a levy of 5 mills produced \$2,052.74; in 1887 was \$454,612.74, and a levy of 5 mills produced \$2,273.06; in 1888 was \$479,580, and a levy of 5 mills produced \$2,397.90; in 1889 was \$398,560, and a levy of 5 mills produced \$1,992; in 1890 was \$438,067, and a levy of 5 mills produced \$2,190.33; in 1891 was \$419,482, and a levy of 5 mills produced \$2,097.41; in 1892 was \$438,086, and a levy of 5 mills produced \$2,190.43; in 1893 was \$478,826, and a levy of 7 mills produced \$3,351.78; that all of said levies were made by the proper authorities, and were made for the sole purpose of paying the amounts due the plaintiff for said water rental, and amounted in the aggregate to the sum of \$18,545.65, and that had it been applied to the payment of said rental nothing would have been due the plaintiff; that the plaintiff has at all times complied with the terms of its contract, and prays judgment for \$4,235.43, with interest from July 1, 1893, and costs." Exhibit B, made part of the petition, shows that the hydrant rental earned by the plaintiff from November 3, 1888, to July 1, 1893, was \$14,490. "That the amount paid by the defendant of such earnings from time to time was \$10,674.80; that the balance due July 1, 1893, of principal was \$3,815.20, with interest on deferred payments amounting to \$420.43, making the amount due plaintiff from defendant July 1, 1893, \$4,235.63."

2. Counsel for the city say that the petition does not state a cause of action, because the petition shows that the contract sued upon was one made between the city and the American Water-Works Company, and the petition does not show that the water company has succeeded, by assignment or otherwise, to the rights of the American Water-Works Company. We have not opened the record certified here by the clerk of the district court of Lincoln county, nor can we do so for any purpose whatever in this case. This action is submitted to us, as already stated, upon a printed abstract, under rule 2 of this court, and in such a case we must look, and look

only, to the printed abstract. The petition of the water company quoted in this abstract alleges that the contract sued upon was made between it and the city, and nowhere in the abstract is any reference made to the American Water-Works Company. For the purposes of this opinion, therefore, we must conclusively presume that the contract sued upon was entered into between the city and the water company. (*Closson v. Rohman*, 50 Neb., 323.)

3. Another contention of counsel for the city in support of the judgment of the district court is that the facts averred in the petition do not show that the city had authority to make the contract with the water company sued upon in this action. At the time the contract in suit was executed the city of North Platte was governed by chapter 14, Compiled Statutes, 1887. Subdivision 15 of section 69 of that chapter in express terms authorized the city council of the city to make contracts with and authorize any person, company, or corporation to erect and maintain a system of water-works and water supply; to give such contractors the exclusive privilege for a term not exceeding twenty-five years, of using the streets and alleys of the city for water mains and supply pipes; and to furnish water to such city and the residents thereof, under such regulations as to supply and price as the city council might prescribe by ordinance. Said section further authorized in express terms the city council of said city to levy and collect a general tax, not exceeding seven mills on the dollar in any one year, on all the taxable property within the city, to pay for water furnished the city under such a contract. This was a general statute, of which the courts of the state are bound to take judicial notice, and it was not necessary for the water company to plead the statute in its petition herein.

4. Another contention of counsel for the city is to the effect that the petition does not state a cause of action, because it shows that for the year 1889, and since to the

bringing of this suit—October, 1893—the annual water rental fixed by the contract amounts to \$3,165, and that a seven-mill levy upon all taxable property of the city for the year 1889, and each year since, would yield a less sum than the water rental fixed by the contract. It may be that if a seven-mill levy upon all the taxable property in the city for any year would not produce sufficient revenue to discharge the water rental of that year, that the city would not be liable for the deficiency; but that question is not presented by this record. The petition of the water company here declares for a balance due it on water rents from November 3, 1888, to July 1, 1893; and it is apparent from the petition that a levy of seven mills upon the taxable property of the city for the years 1888, 1889, 1890, 1891, and 1892 would yield a revenue of \$15,226.42; and the petition avers that for those years the water rentals accruing to it were only \$14,490; or that the water rentals were less than the revenue that could have been raised by a levy of seven mills upon the taxable property for the time. The petition further alleges that there have been paid to it on the water rental for said time \$10,674.80. Deducting this from the revenue that would have accrued from a seven-mill levy, the petition alleges, in effect, that there was at the time the suit was brought \$4,552.62 in the treasury applicable to the payment of the water rents. The petition, therefore, states a cause of action. The court erred in sustaining the demurrer. Its judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

EMANUEL G. BURKLAND V. CHARLES A. JOHNSON.

FILED MARCH 3, 1897. No. 7143.

1. **Arbitration and Award: MISTAKE: CORRECTION.** Whether an award made in pursuance of title 28, Code of Civil Procedure, may be set aside or modified, on motion, because of a mistake in computation or allowance of interest by the arbitrators,—such mistake not appearing upon the face of the award,—not decided.
2. ———: ———: ———. If such an award may be set aside or modified on motion for such reason it can only be done when it appears that such a mistake was that of all the arbitrators whose concurrence was necessary to the making of the award.
3. ———: DUTY OF ARBITRATORS: CONCLUSIONS OF FACT AND OF LAW. It is the duty of arbitrators chosen and acting in pursuance of the provisions of title 28, Code of Civil Procedure, to make and state separately the conclusions of fact and conclusions of law reached by them, unless the parties to such arbitration have by their agreement of submission waived such requirement.
4. ———: ———: ———: WAIVER. An award made by such arbitrators without a statement of any conclusions of fact or conclusions of law found by them, such requirements not having been waived, is erroneous and a judgment confirming such award may be reversed in a direct proceeding instituted for that purpose.
5. ———: ———: ———: CONFIRMATION. The failure of such arbitrators to make and state the conclusions of fact and law found by them is an irregularity merely, and one that does not render their award void nor oust the district court of jurisdiction to confirm it.
6. ———: WAIVER OF IRREGULARITIES. It is competent for parties to such an arbitration to waive any irregularity in the proceeding which does not go to the jurisdiction of the arbitrators to act, or the jurisdiction of the district court to confirm the award made.
7. **Submission of Controversy: ACKNOWLEDGMENT.** Parties who submit their differences to arbitration in pursuance of the provisions of title 28 of the Code of Civil Procedure, must acknowledge their agreement of submission before a justice of the peace, and failure to do so will deprive the district court of jurisdiction to confirm the award made or render judgment thereon on motion of the successful party.
8. ———: ———: CONFIRMATION. The failure to acknowledge before a justice of the peace the agreement of submission is not an irregularity that the parties to the arbitration may waive; and their

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ratification of an award made under such defective submission will not invest the district court with jurisdiction to confirm such award.

9. **Jurisdiction:** Jurisdiction of the subject-matter of an action cannot be conferred upon a court even by consent.
10. **Arbitration.** The method provided by title 28 of the Code of Civil Procedure for settling differences existing between parties by arbitration is not exclusive. That right existed at common law and has not been taken away by the statute.
11. —: **AWARD: ESTOPPEL.** *Held*, In the case at bar, that the plaintiff in error had estopped himself from assailing the award made, either because of the failure of the arbitrators to state the conclusions of fact and conclusions of law found by them, or because of a mistake in computation and allowance of interest alleged to have been made by the arbitrators.

ERROR from the district court of Saunders county.
Tried below before WHEELER, J. *Reversed*.

V. L. Hawthorne and Pound & Burr, for plaintiff in error.

George I. Wright and Good & Good, *contra*.

RAGAN, C.

On the 27th of March, 1894, Emanuel G. Burkland and Charles A. Johnson submitted certain differences existing between them to arbitrators. The submission was in writing, duly signed by the parties, and acknowledged by them before a notary public. The arbitrators selected convened and, after a somewhat protracted investigation, made in writing their award as required by the agreement between Burkland and Johnson. The award, so far as material here, is as follows:

"First—We award that E. G. Burkland shall, on or before the 1st day of May, 1894, pay and discharge the judgment and costs in the case of the Saunders County National Bank v. E. G. Burkland and C. A. Johnson, now pending in the district court of said county, and not further prosecute said case.

"Second—We award that C. A. Johnson shall file a dismissal of the suit wherein he is plaintiff and said Burk-

land is defendant at the costs of said Johnson, said suit being for the specific performance of a real estate contract; and the said Johnson shall sign said dismissal and pay the costs in said suit on or before the 1st of May, 1894.

“Third—We award that said E. G. Burkland and C. A. Johnson shall file a dismissal and settlement, at the costs of said C. A. Johnson, in each of the suits for rent which are now pending in the courts of said county, and that C. A. Johnson shall pay the costs therein on or before May 1, 1894.

“Fourth—We award that E. G. Burkland and wife shall make and deliver to said C. A. Johnson, on or before May 1, 1894, a quitclaim to lot one (1), block one hundred and forty-eight (148), in the County Addition to the city of Wahoo, aforesaid.

“Fifth—We award that C. A. Johnson and wife shall make and deliver to E. G. Burkland, on or before May 1, 1894, a quitclaim deed to lots three and four (3 and 4), block one hundred and forty-nine (149), in the County Addition to Wahoo, aforesaid.

“Sixth—We award that said E. G. Burkland shall, on or before the 1st day of May, 1894, pay or secure by good bankable paper to the said C. A. Johnson the sum of three thousand and eighty-nine (\$3,089.50) dollars and fifty cents.

“Seventh—We award that upon the compliance with the foregoing awards by the parties, the said E. G. Burkland shall execute and deliver to said C. A. Johnson a release of all actions and causes of action or demands, of whatsoever nature, which existed between them at the time of the execution of the contract and bonds for arbitration, and that the said C. A. Johnson shall execute and deliver to said E. G. Burkland a similar release at same time.

“Eighth—We award that each party pay one-half of the costs of this arbitration.”

This award was filed in the office of the clerk of the

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district court of Saunders county on the 1st day of May, 1894, and Johnson thereupon moved the court to confirm it. The court caused a notice of this motion to be served upon Burkland, who appeared and moved the court to set aside the award, on grounds that will be hereinafter stated. A large number of affidavits were read to the court in support of the motions filed by the respective parties, which are incorporated into the bill of exceptions and made a part of the record here. The district court found specially that Johnson had in all things ratified and confirmed said award and performed all requirements thereof; that Burkland had accepted said award and the terms and provisions thereof, and had in all things ratified the same and performed all the requirements of said award, except the requirement contained in the sixth item of said award; and thereupon the court sustained the motion of Johnson to confirm said award, confirmed it, and, upon the motion of Johnson, rendered judgment in his favor and against Burkland for the amount awarded the former against the latter by the arbitrators in the sixth item of their award. To reverse this judgment Burkland has prosecuted here a petition in error.

1. One of the grounds of Burkland's motion to set aside the award of the arbitrators was that they had made a mistake in the computation of the amount awarded Johnson in the sixth item of their award, and that this mistake consisted in allowing Johnson certain interest. And the argument is made here that the judgment of the district court confirming the award should be reversed because of this alleged mistake of the arbitrators in the amount awarded Johnson from Burkland. The mistake in computation, if there was one, does not appear upon the face of the award, and whether one party to an arbitration proceeding may, on motion, assail the award made on such ground we do not decide. If an award may be assailed by motion to set it aside because of a mistake in computation made by arbitrators, the relief asked for by

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the motion can only be granted; that is, the award can only be set aside or modified for such reason when it appears that such a mistake was made, and that it was the mistake of all the arbitrators. (*Pulliam v. Pensoneau*, 33 Ill., 375.) In the case at bar all the arbitrators do not concur in saying that the amount awarded Johnson was the result of a mistake made by them in computation or in allowing him interest. Indeed, the evidence leaves no doubt in our minds that the award made by the arbitrators was the one they all intended to make, and we therefore conclude that the district court found that no mistake as to computation or allowance of interest had been made by the arbitrators, and the evidence certainly sustains that conclusion. By the agreement of submission entered into between the parties five arbitrators were selected, and the award made by any three of them was to be binding upon the parties to the arbitration proceeding. The award made by these arbitrators is the judgment of the tribunal selected by the parties themselves, and, like any other judgment, it is conclusive and binding upon the parties to the arbitration proceeding, both as to the law and the facts; and the sixth item of the award is the deliberate judgment of three of these arbitrators at least, and it is final and conclusive as against the parties to this proceeding.

2. This arbitration proceeding took place in pursuance of title 28, being sections 862 to 879, both inclusive, of the Code of Civil Procedure. Section 867 of this Code provides that all the rules prescribed by law in cases of referees are applicable to arbitrators, except as herein otherwise expressed, or except as otherwise agreed upon by the parties; and section 300, Code of Civil Procedure, among other things, provides that referees must make a statement of the conclusions of fact and law found by them, and make such statements separately. Another ground of the motion made by Burkland in the district court for setting aside this award, and insisted upon here, is, in effect, that the award made by the arbitrators is

not supported by any findings or conclusions of fact, and that, therefore, the award and the judgment pronounced thereon are erroneous. It is quite clear that the arbitrators in their report stated no conclusions of fact and no conclusions of law. They simply made an award. In other words, the award is a judgment without any findings of fact or conclusions of law on which to rest. Such an award or such a judgment is not void, but voidable and erroneous at most, and a judgment confirming such award may be reversed in a direct proceeding instituted for that purpose. (*Doty v. Sumner*, 12 Neb., 378; *Connelly v. Edgerton*, 22 Neb., 82.) It is also true that it was made the duty of the arbitrators in the case at bar, by the sections of the Code just referred to, to separately state the conclusions of fact and conclusions of law reached by them, as well as to make their award, the parties not having, in their agreement of submission, waived this requirement of the Code. (*Murry v. Mills*, 1 Neb., 456; *Graves v. Scoville*, 17 Neb., 593; *Westover v. Armstrong*, 24 Neb., 391.) The failure of the arbitrators to make and state the conclusions of fact and law found by them was an irregularity merely, but one that did not render their award void nor oust the district court of jurisdiction to confirm it; and these irregularities were of such a nature as the parties to the arbitration proceeding might waive, and notwithstanding their existence the parties to the arbitration might ratify the award made. The district court found specially—and the evidence sustains the finding—that Johnson had accepted and ratified the award made, and had on his part performed everything required of him; that Burkland had ratified the award; had accepted it and performed all things required by the award of him except the sixth item thereof. This award was an entirety, and Burkland having accepted the part thereof that was beneficial to him, is now estopped from assailing the award made for any irregularity in the proceedings of the arbitrators. It was competent for him to waive any irregularity in the arbitration proceeding which did

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not go to the jurisdiction of the arbitrators' act or the jurisdiction of the district court to confirm the award made; and by his conduct he has waived the failure of the arbitrators to state the conclusions of fact and law found by them. (*Thornton v. McCormick*, 39 N. W. Rep. [Ia.], 502; *Miller v. Brumbaugh*, 7 Kan., 343; *Phillips v. Couch*, 66 Mo., 219; *Culver v. Askley*, 36 Mass., 300; *Cogswell v. Cameron*, 136 Mass., 518; *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N. Y., 392; *Hays v. Hays*, 23 Wend. [N. Y.], 363; *Jones v. Phoenix Bank*, 8 N. Y., 228; *Hazen v. Addis*, 14 N. J. Law, 333; *State v. Gurnee*, 14 Kan., 111.)

3. Section 863 of the Civil Code provides that parties who are about to submit matters of difference between them to arbitration must sign a written agreement of submission. Section 864 of the Code provides that the parties must then appear before some justice of the peace of the county and acknowledge the instrument of submission signed by them to be their free act and deed. The parties to the arbitration proceeding here complied with this statute in all respects, except that they acknowledged their written agreement of submission before a notary public of the county instead of a justice of the peace. It was insisted by Burkland in the court below, and is insisted here, that the district court was without jurisdiction to confirm the award made and render a judgment thereon on motion, because the agreement of submission to arbitration was not acknowledged before a justice of the peace. The authorities are uniform, so far as we have been able to examine them, in support of this contention of the plaintiff in error.

The statute of arbitrations and awards of the state of Illinois provides that parties might submit differences existing between them to arbitration by an instrument in writing, signed by them and attested by at least one witness. In *Moody v. Nelson*, 60 Ill., 229, the parties submitted their differences to arbitration by an instrument in writing, but it was not witnessed, and the supreme court held that the circuit court was without jurisdiction to

render a judgment upon the award made. The court said: "It is indispensable to the jurisdiction of courts to render judgment upon an award of arbitrators that the submission be executed with the formalities of and contain in substance what is required by the statute." To the same effect see *Low v. Nolte*, 15 Ill., 368.

The Code of Iowa provided that the agreement of parties to submit their difference to arbitration should be acknowledged; and in *Fink v. Fink*, 8 Ia., 313, it was held that an award made in pursuance of an unacknowledged agreement therefor conferred no jurisdiction upon the district court to render a judgment upon the award.

The statute of Massachusetts required an agreement for arbitration to be acknowledged before a justice of the peace. Such an agreement was signed by both parties, but acknowledged by only one of them; and the supreme court of Massachusetts held that the *nisi prius* court had no jurisdiction to render a judgment upon the award made. (See *Abbott v. Dexter*, 6 Cush. [Mass.], 108.)

The statute of Minnesota provides that an agreement for arbitration must be acknowledged before a justice of the peace; and in *Barney v. Flower*, 7 N. W. Rep. [Minn.], 823, the supreme court held: "In a submission to arbitration under the statute the agreement to submit must be acknowledged before a justice of the peace; an acknowledgment before any other officer will not do. The proper acknowledgment cannot be afterwards waived by the parties, even though that objection is not made on the application to confirm the award and for judgment on it."

In *Gibson v. Burrows*, 3 N. W. Rep. [Mich.], 200, it was held: "No rule of arbitration can be enforced by a judgment thereon unless it in all respects conforms to the statutory provisions." To the same effect see *Holdridge v. Stowell*, 40 N. W. Rep. [Minn.], 259; *Heath v. Tenney*, 3 Gray [Mass.], 380; *Burghardt v. Owen*, 13 Gray [Mass.], 300; *Franklin Mining Co. v. Pratt*, 101 Mass., 359; *Darling v. Darling*, 16 Wis., 675; *Steel v. Steel*, 1 Nev., 27.

The failure of the parties to the arbitration proceeding to acknowledge their written submission before a justice of the peace was one which went to the jurisdiction of the district court to pronounce a judgment upon the award finally made. In other words, the parties to an arbitration proceeding, in order to make it such a proceeding as the statute contemplated, and as would authorize the district court, on the coming in of the award, to confirm it and render a judgment to carry it into effect, must have complied with the statute. The fact that the parties to the arbitration proceeding accepted the award made and performed the requirements thereof amounted to a ratification of the proceedings of the arbitrators and waived any irregularities on their part, but did not confer jurisdiction on the district court to confirm the award or to render judgment thereon. Jurisdiction of the subject-matter of an action cannot be conferred upon a court even by consent.

We conclude, therefore, (1) that the finding and judgment of the district court to the effect that the sixth item of the award was not the result of a mistake made by the arbitrators in computation or allowing interest were and are correct; (2) that the plaintiff in error, by his conduct, has ratified the award made and is estopped from now assailing it because of the failure of the arbitrators to state the conclusions of fact and conclusions of law found by them; (3) that because of the failure of the parties to acknowledge the agreement of submission before a justice of the peace, the district court was without jurisdiction to confirm the award on motion and without jurisdiction to render a judgment upon the award made. The decree of the district court is

REVERSED.

JAMES GOLDER V. JOHN LUND.

FILED MARCH 3, 1897. No. 7110.

1. **Personal Injuries: MEDICAL TREATMENT: EXPENSE: EVIDENCE.** In an action for personal injuries it is proper to admit evidence of the actual expense incurred by plaintiff in procuring medical treatment, the rule being that he may recover the reasonable value of such services, not to exceed the actual expense incurred.
2. ———: ———: ———: ———. In order to recover in such an action for expenses of medical treatment it is not necessary to prove by the record that the physician rendering the services was licensed to practice under the statute. Proof that he practiced as a physician raises the presumption in actions between third parties that he was licensed to do so.
3. **Assault and Battery: DAMAGES: EVIDENCE OF DISPOSITION.** In an action for assault and battery, self-defense being pleaded as a defense to the action, proof that plaintiff was of a quarrelsome disposition and ungovernable temper must be made by proof of general reputation and not by opinions of witnesses based on their individual observation.
4. **Trial: MISCONDUCT OF ATTORNEY: REVIEW.** Generally a judgment will not be reversed because of improper remarks by counsel in argument when, on objection made the court interposes, the jury is directed to disregard the statement, and the improper remarks are not repeated.
5. ———: ———: ADMONITION. In such case an admonition addressed by counsel making the remark to the jury is equivalent to one addressed by the court.
6. ———: ———: EXCEPTIONS: REVIEW. In order to preserve for review error in permitting improper remarks by counsel, objection must be made at the time, a ruling obtained and exception taken.

ERROR from the district court of Dodge county. Tried below before MARSHALL, J. *Affirmed.*

Frick & Dolezal, for plaintiff in error.

J. C. Crawford and *A. H. Briggs*, *contra.*

IRVINE, C.

Lund sued Golder for assault and battery. The defenses interposed were a denial of the assault, self-

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defense, and certain averments by way of mitigation of damages. There was a verdict and judgment for the plaintiff for \$1,500, which the defendant seeks to reverse.

Certain assignments of error are waived in the brief. Of those insisted upon, two relate to the admission of evidence with regard to the expenses of medical attendance in the treatment of plaintiff for the injuries alleged to have been inflicted upon him. The plaintiff, after narrating the circumstances and consequences of the alleged beating, testified that he called Dr. Bartlett to treat his wounds; that he was confined to bed for six weeks and required constant nursing. He was then asked this question: "What amount of money did you expend in employing physicians, or physician and medicine together?" This was objected to, the objection overruled, and an exception taken. Aside from other grounds of objection, which apply to another assignment of error and which will be noticed later, it is urged that this question permitted a recovery for any sum the plaintiff might have seen fit to expend. It is true that the measure of recovery for such expenses is not the sum actually expended, but is confined to the reasonable expense. (*Hewitt v. Eisenbart*, 36 Neb., 794; *City of Friend v. Ingersoll*, 39 Neb., 717.) In the cases cited, however, the evidence of actual expenses was not coupled with evidence that such expenses were reasonably incurred, and verdicts based solely on the evidence of actual expenditure were held bad for that reason. The rule whereby such expenditures are recovered is based upon the doctrine of avoidable consequences. It is the duty of the person injured to exercise reasonable precautions in order to render the injury as slight as possible. Failing to perform that duty, he cannot recover for consequences which might thereby have been avoided; therefore he is entitled to to recover the expenses reasonably by him incurred by reason of such precautions. As held in the cases cited, he may not recover his actual expense, regardless of its reasonableness. On the other hand, he cannot speculate

on this item of damages and recover what would be a reasonable expense unless he has in fact incurred it, either by payment or by becoming liable therefor. In cases of personal injuries, in order to recover for medical attendance and similar items, it is necessary, therefore, for the plaintiff to show two facts: First, what expense he actually incurred; and secondly, that it was reasonably incurred. It is not the reasonable charge for medical services which he may recover, but the expense to him of such services, not to exceed their reasonable value. It was, therefore, proper for the plaintiff to show what expense he had actually incurred, and in this case this evidence was followed by proof of what was reasonably incurred, so the case does not fall within the rule of either of the cases above referred to.

Dr. Bartlett, after testifying that he was a practicing physician in Dodge county, and had been such for three years, and that he had rendered professional services to the plaintiff in the treatment of his injuries, was asked: "What are your charges for attending the plaintiff during that sickness?" This was objected to as incompetent, irrelevant, and immaterial, and because no proper foundation had been laid for the question. The objection was overruled. In support of this objection it is urged that there was no evidence that Dr. Bartlett had complied with the provisions of chapter 55, Compiled Statutes, with regard to the practice of medicine; that he was, therefore, not shown to be qualified to testify as an expert in regard to the value of his services, and further, that section 15 of that chapter providing that no person who has not complied with the provisions of that act may recover for medical services, and the plaintiff not having at the time of the trial paid the bill, it was not shown that any expense had been incurred for which the plaintiff was legally liable. The first part of the argument does not meet the question, which does not relate to the value of the services, but to the actual charge therefor. The objection would apply, however, to the

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following question, which related to the reasonableness of the charge, and which was also properly objected to. A consideration of the second reason, however, argumentatively disposes of this question, although we do not wish to be understood as holding that in order to qualify a person learned in the profession to testify as an expert he must necessarily be qualified under the act to practice medicine in this state. It is true that the act in section 15 does in express terms prohibit a recovery for medical services rendered by a person not licensed to practice under the act. (*Maxwell v. Swigart*, 48 Neb., 789.) But it does not follow that in all proceedings the burden is upon the party asserting the professional character of the physician to prove by the record his license to practice. It has been said that "The general rule is that when a person is required to do a certain act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be intended that he has duly performed it unless the contrary is shown. * * * But in civil or criminal prosecutions for a penalty for doing acts which the statutes prohibit, excepting by those who are licensed therefor, no such presumption arises; and where the subject-matter of the negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by the other party." (*State v. Crowell*, 25 Me., 171; *Brown v. Young*, 2 B. Mon. [Ky.], 26.) The authorities are generally to the effect that in a prosecution for carrying on a trade or profession without a license the burden is on the defendant to prove the license, but only because it is a fact peculiarly within his own knowledge, and one susceptible of very ready proof by him, while the contrary might require voluminous or difficult proof by the prosecution. In some cases this rule has been extended to actions for services performed by some person exercising a calling requiring a license. (See, among other cases, *Adams v. Stewart*, 5 Harr. [Del.], 144; *Dow v. Haley*, 30 N. J. Law, 354.) On the other hand, there are many cases distinguishing between prose-

cutions and actions for penalties on the one hand, and suits to recover for services on the other, holding that in cases of the latter class the presumption is in favor of a license. (*Brown v. Young*, *supra*; *Haskill v. Commonwealth*, 3 B. Mon. [Ky.], 342; *McPherson v. Cheadell*, 24 Wend. [N. Y.], 15; *Thompson v. Sayre*, 1 Den. [N. Y.], 175; *Williams v. People*, 20 Ill. App., 92.) We are not called upon to here determine what would be the rule in an action for services by the physician. The cases holding that in such actions a license is presumed distinguish such actions from prosecutions, or penal actions for proceeding without a license, on the ground that in the former class the issue is collateral. Whether or not this reason is sound when applied to an action for services, it is certainly sound when applied to an action between third parties, such as the case before us. To practice medicine without a license is, by section 16 of the act, made a misdemeanor, so that to require the license in this case to be affirmatively proved would be to presume a stranger to the action guilty of a crime. The reason for indulging apparently a similar presumption in prosecutions or penal actions has been already stated, to-wit, the fact that the evidence lies peculiarly within the power of the defendant. This reason does not apply when the qualifications of the physician are involved in a proceeding to which he is not a party. We think, therefore, whatever may be the rule in an action by or against the physician, that in an action to which he is not a party proof that he practiced as a physician raises the presumption that he was qualified to do so. A case directly in point and sustaining this view is *City of Chicago v. Wood*, 24 Ill. App., 40.

A witness was asked the following question, referring to the plaintiff: "Were you acquainted with his disposition and character as to being peaceable or quarrelsome?" This was on objection excluded, and the defendant then offered to prove that the witness knew the disposition and character of the plaintiff, and that he

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was quarrelsome, easily aroused, and had an ungovernable temper. This evidence was offered in support of the plea of self-defense. We can certainly see no reason why it is not proper, in support of such a defense, to make proof of the plaintiff's character in a civil action for assault and battery as much as in a prosecution for homicide; but in such cases the proof must be of the plaintiff's general reputation, and not by the opinion of witnesses as to his general character. (*Carleton v. State*, 43 Neb., 373.) Neither the question nor the offer promised the production of evidence of reputation, but merely of the witness' opinion, and the case last cited is on this point directly applicable.

Several assignments relate to alleged misconduct of counsel in argument. The showing made was by affidavits in support of a motion for a new trial. There is very little conflict in the evidence as to what occurred. The trial judge having overruled the motion for a new trial, we should properly consider this evidence in the light most favorable to the plaintiff, but there being so little conflict, we accept the statement of defendant's witnesses to the effect that during the closing argument one of the counsel for plaintiff said that he had known the defendant for a number of years; that they had always been good friends, and that later he said: "I tell you, Golder is a fighter, and he is the bully of that whole country up there when he gets his Irish up." Thereupon the defendant excepted to the statement of counsel that Golder was a fighter and a bully; and the court said that the statement was improper and such statements should not be made. Counsel for plaintiff then said that the jury should not pay any attention to it, and the defendant still insisted on his exception. It does not appear that the language was repeated, or that any similar remark was thereafter made. It is urged that the mere remark of the court that the statement was improper was not sufficient without an admonition to the jury to disregard the statement, but the defendant's proof shows that counsel

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for the plaintiff himself gave the jury that admonition. There may be cases so flagrant,—such abuses of the privilege of counsel,—that a remark, once made, would be so prejudicial that no admonition by the court would cure the error, but we do not think that the remark here complained of was of that character. It was only by inference from a former statement that it could be taken as a statement of fact within counsel's knowledge, rather than an inference from the testimony. Generally an admonition by the court, when the improper language is not persisted in, is sufficient to cure the error. (*Atkins v. Gladwish*, 27 Neb., 841; *Mchagan v. McManus*, 35 Neb., 633.)

Counsel also, in argument, commenting on the testimony of the physician as to the time which it would take for the wound to heal, said: "I have had a good deal of experience with wounds myself, and I have never known a wound to heal up in as short a time as Dr. Inches said it would." Objection was made to this language, but no ruling obtained from the court, and counsel desisted from stating his own experience. In order to render available an assignment of error based on improper language used by counsel in argument, not only must objection be made at the time, but a ruling obtained and an exception taken. (*Gran v. Houston*, 45 Neb., 813.) No ruling having been obtained on this objection, and counsel having yielded to the suggestion and desisted from further statements of that character, the language, if improper, which we do not decide, was not ground for reversal.

AFFIRMED.

STATE OF NEBRASKA, EX REL. WOODRUFF-DUNLAP
PRINTING COMPANY, V. J. S. BARTLEY ET AL.

FILED MARCH 3, 1897. No. 8948.

1. *Mandamus*. A writ of *mandamus* will only be allowed when the relator clearly establishes his right. Nothing essential to that right will be taken by intendment.
2. ———: STATE PRINTING BOARD: AWARDED CONTRACTS. The statute providing that no bid for state printing shall be considered unless accompanied by a bond conditioned to give bond for the performance of the contract should it be awarded, a bidder, though otherwise entitled to the contract, cannot have the aid of a writ of *mandamus* to compel the awarding of the contract to him when he does not show that his bid was accompanied by the bond so required.

ORIGINAL application for *mandamus* to require the state printing board to award to the relator the contract to print and bind the reports of state officers, and other reports. *Writ denied*.

J. H. Broudy, for relator.

C. J. Smyth, Attorney General, and *Ed P. Smith*, Deputy Attorney General, for respondents.

IRVINE, C.

An act of 1883, Session Laws, chapter 61, Compiled Statutes, chapter 68, provides for printing for the state. The auditor of public accounts, treasurer, and secretary of state are constituted a state printing board and given general supervision over the matter of state printing, in the manner provided by the act. The act provides that the board shall advertise at certain times, and in a certain manner, for proposals for the different classes of printing provided for. It is required that the advertisement shall state that the board reserves the right to reject any and all bids (sec. 4); that the proposal or bid for any of the contracts shall not be considered unless

the same shall be accompanied by a bond in the sum of \$5,000, with two or more sureties, conditioned that in case the party proposing shall be awarded the contract he will, within five days after the award, enter into bonds for the faithful performance thereof (sec. 7). It is then provided that it shall be the duty of the secretary of state to give immediate notice to the successful bidder of the acceptance of his proposal, and that he shall in five days thereafter enter into bonds in the sum of not less than twice the amount of the contract price, conditioned for the faithful performance of the contract, and if he fail to give bond within the time allowed, then "the contract shall be given to the next lowest bidder, who will give bond as aforesaid, or the board may, in their discretion, advertise anew and relet the contract in the manner hereinbefore provided." (Sec. 8.) Further provision is made for actions upon the preliminary bond for failure to give the final bond. (Sec. 10.) Section 2 of the act is as follows: "The printing of all bills for the legislature, with such matters as may be ordered by either house thereof to be printed in bill form, shall be let in one contract. The printing and binding of the senate and house journals shall be let in another contract. The printing and binding of reports of state officers authorized by law to be printed, and all other reports and documents ordered by the legislature, except such as enter into and form a part of the journals, shall be let in another contract. The printing and binding of the laws, joint resolutions, and memorials enacted by the legislature shall be let in another contract. And the printing and binding of all blanks, blank books, and circulars required to be furnished by the officers of the executive department of the state shall be let in another contract."

The relator, a corporation formed for the purpose of conducting a printing business, instituted this action against the then members of the state printing board, praying for a writ of *mandamus* to require the respondents to award and let to the relator a contract for the

printing and binding of the reports of state officers and all other reports and documents ordered by the legislature, except such as enter into and form a part of the journals. The terms of office of the original respondents having expired, an amendment was made praying for similar relief against their successors. The attorney general, on behalf of the respondents, demurred generally to the relation.

Omitting formal and unessential matters, the relation avers that the state printing board duly advertised for bids as provided by the act, designating as class 1 the printing of bills for the legislature, with such matters as may be ordered by either house; as class 3, the reports of state officers and other reports and documents ordered by the legislature not forming a part of the journals, and undertook to reserve under class 3 the right to award contracts in whole or in part, as the board should elect; that the relator filed its bid for the work designated as class 3; that this bid was considered; that it was the lowest and best bid therefor in the aggregate; that, considered by items, its bid was the lowest for certain reports, but the bids of two others were lower than the bid of the relator for certain other reports; that the relator then tendered to the printing board its bond, as required by law, for the performance of the contract for printing all the reports, but the board refused to award to the relator the contract for the whole of the work, solely because it deemed proper to sever the contract and award to the relator the printing only of such reports for which it was the lowest bidder, and undertook to award to the two other competitors referred to the contracts for printing those reports for which they were, respectively, the lowest bidders. The relator contends that under section 2 of the law, already quoted, the printing of all reports must be awarded in a single contract, and that the board had no power under the law to sever the contract. The respondents, in support of their demurrer, contend against this construction of the statute, and also insist

that the relator has, for other reasons, failed to show a right in itself to the contract, among such being that the relator does not aver that it tendered the preliminary bond required by section 7 of the statute. This defect is fatal to relator's case, and renders a decision of other questions unnecessary. The positive mandate of the law in section 7 is that a proposal shall not be considered unless it be accompanied by a bond conditioned for the giving of bond for the performing of the contract in case it shall be awarded. This provision is not idle and the giving of the preliminary bond is not a bare formality. If a bidder is successful and fails to give the proper bond for the performance of his contract, the board may either relet the contract to the next lowest bidder who will give bond or it may readvertise and receive new bids. In either event the state sustains a loss, and the requiring of preliminary bonds is for the purpose of protecting the state against that loss. While the relator alleges that it tendered the final bond for the performance of the contract, it does not allege that it tendered the preliminary bond with the bid. If that bond was not tendered, it was not only the right, but the duty of the board to disregard the bid. In order to obtain a writ of *mandamus* the right of the relator must be clear, and nothing essential to that right will be taken by intendment. (*State v. School District*, 8 Neb., 92; *State v. Mayor and Council of Omaha*, 14 Neb., 265; *State v. Nelson*, 21 Neb., 572; *State v. Babcock*, 25 Neb., 500; *State v. Sabin*, 39 Neb., 570; *State v. Cook*, 43 Neb., 318; *State v. Home Street R. Co.*, 43 Neb., 830; *State v. Bowman*, 45 Neb., 752.) While the relation alleges that the board based its refusal solely upon its claim of power to sever the contracts, still the writ should not be granted unless it be made to appear that the relator was, aside from that contention, entitled to the award.

WRIT DENIED.

EUGENE F. SEAVER ET AL. V. JOHN HALL.

FILED MARCH 3, 1897. No. 7124.

1. **Vendor and Vendee: BREACH OF CONTRACT: DAMAGES.** When two or more persons have contracted to convey land to a third person, the vendors cannot, by contract or conveyance among themselves, release any of them from the obligation to respond to the vendee for damages arising from a breach of the contract.
2. ———: **FAILURE TO MAKE TITLE: REMEDY OF VENDEE.** Where a vendor of land cannot make title, the vendee may at his election recover payments of purchase money with interest, or damages for the loss of his bargain.
3. ———: ———: **SPECIFIC PERFORMANCE.** Where time is not of the essence of the contract, a vendor who is unable to make title at the time he should convey, may have specific performance by tendering good title at any time before decree, provided he has acted in good faith and specific performance can be enforced without injustice to the vendee.
4. ———: ———: ———: **RENTS AND COSTS.** In such case an awarding of rents to the vendee together with costs, in the absence of special circumstances adjusts the equities.
5. **Record for Review: DATE OF FINDINGS.** The record as to the time a finding was made prevails as against an objection based on the hypothesis that the finding was earlier made, in the absence of some showing of record in support of the objection.

ERROR from the district court of Douglas county.
Tried below before BLAIR, J. *Reversed.*

Wharton & Baird, Bartlett, Baldrige & De Bord, and Breckenridge & Breckenridge, for plaintiffs in error.

George W. and W. G. Doane, contra.

IRVINE, C.

This action was begun by Hall against Eugene F. Seaver, George N. Hicks, James M. Swetnam, George W. Loomis, Amelia Burroughs, and Ella E. Latson to recover moneys paid to the defendants under a contract for the purchase of land. From a judgment for the plaintiff

the defendants prosecute error. The questions raised are for the most part questions of law of general application. The case was tried to the court, a jury having been waived, and the facts may perhaps be best stated by an abstract of the special findings, which, except in one particular, are admitted to be in accordance with the evidence.

On June 8, 1887, Hall entered into a contract with the defendants whereby defendants agreed to sell plaintiff lot 7, block 4, West Lawn Addition, to which the defendant then had a valid fee-simple title. The price was \$425. The time for payment was extended, but final payment made June 14, 1893, and a deed demanded, which defendants were unable to make, because the defendant Seaver "had, through inadvertence and mistake, conveyed the same to one Ames, and so had put it beyond his power to convey the same to plaintiff, and defendants at that time had no title thereto." April 27, 1888, the defendants, who prior thereto had owned in common the tract of land known as West Lawn, including the lot in question, divided their respective holdings, lot 7, block 4, falling to the defendant Seaver. The other defendants executed to him a quitclaim deed and assigned to him their interest in the contract with plaintiff. All payments made thereafter were made to Seaver, "as they had been before that time," but plaintiff had no notice until he had fully completed his payments that the title did not remain in the defendants, as it was when the contract was made. When final payment was made Seaver promised to deliver a warranty deed, "but prior to that time the said Seaver had, as hereinbefore stated, through inadvertence and mistake, but without any intention whatever to commit any fraud upon plaintiff, conveyed (with forty-nine other lots) the said lot 7, block 4, West Lawn, to one George W. Ames, and learned such mistake on said June 14, 1893, and immediately upon ascertaining such fact entered upon negotiations with said Ames to procure a reconveyance of said lot from Ames to said Seaver, in

order that the said Seaver might make the conveyance of said lot to said Hall, but said negotiations failed because of the inability of Seaver to pay the price asked for said lot." July 18, 1893, plaintiff served notice upon the defendants of his intention to rescind the contract. Between June 14 and July 19 (when the suit was brought) Seaver endeavored to procure title, but failed to do so until March 15, 1894. After the negotiations between Seaver and Ames failed, defendant Loomis continued same, with the result that on March 15, 1894, Ames and wife reconveyed to Seaver. March 21, Seaver and wife made and tendered to plaintiff their warranty deed, which plaintiff refused. The title was then clear. Judgment was rendered for the amount which had been paid by Hall, with interest.

The first question presented relates to the measure of damages. It is contended that if the case be viewed as an action for money had and received, the judgment should have been against Seaver alone for moneys paid after the partition among the defendants, and, viewed as an action for damages for breach of contract, the measure would be the value of the lot at the time conveyance should have been made, and not the purchase price. There are no forms of action under the Code except where specially provided. The question is, does the petition state any cause of action, and if so, one calling for the relief granted? We do not think that the partition of the property among the defendants released any of them from liability to Hall. The contract was with all the defendants, and while they might by agreement among themselves partite the property and change their mutual rights and obligations, they could not by such action affect their obligations to Hall or discharge any of them from any of such obligations. While as among the defendants Seaver became entitled to receive the purchase money to his own use, Hall could still hold them all responsible for the performance of their contract and look to all for damages resulting from its breach, no matter

how those damages accrued. It is claimed that that part of the findings to the effect that plaintiff had no notice of the conveyance to Seaver is not sustained by the evidence. We think, however, it is. As to the measure of damages, it has been several times held that the vendee who has paid the purchase money may, on failure of title, recover it back, and this although the vendee was himself in default. (*Eaton v. Redick*, 1 Neb., 305; *Reed v. Beardsley*, 6 Neb., 493; *McPherson v. Wiswell*, 19 Neb., 117.) And this doctrine receives much support elsewhere. (See, for instance, *Stickter v. Guldin*, 30 Pa. St., 114; *Bassett v. Bassett*, 55 Me., 127; *Hurd v. Denny*, 16 Ill., 492.) There are other cases in this court holding that the vendee is entitled to the benefit of his bargain, and assimilating the rule of damages to that in cases of personal property. (*Wasson v. Palmer*, 13 Neb., 376; *Carver v. Taylor*, 35 Neb., 429; *Violet v. Rose*, 39 Neb., 660.) It would appear that this court has thereby placed itself on both sides of the much disputed question as to whether, when the vendor cannot make title, only nominal damages can be recovered, or whether the vendee is entitled to the benefit of his bargain. Some cases hold that the former rule applies where the vendor acted in good faith (*Conger v. Weaver*, 20 N. Y., 140), and that the latter applies when the vendor was guilty of fraud (*Pumpelly v. Phelps*, 40 N. Y., 59). If this distinction is to be observed, and it receives support in many states other than New York, the present case would, under the findings, be brought within the rule of nominal damages; that is, the damages would be nominal for the breach, but the vendee would be entitled to recover his payments, a result which would sustain this judgment. It may well be doubted, however, whether, in a state where exemplary damages are not permitted, the measure of recovery should depend on the good faith of the vendor. The object of the law is to afford compensation, and not to punish, in civil cases, and the actual damage is the same regardless of the motive of the vendor. We think, however, that the cases can be

reconciled on a more logical basis. The vendor should not be permitted to speculate on his contract. If either rule of damages should be enforced, to the exclusion of the other, he would be permitted to do so. If the rule of nominal damages alone prevails, then if the land rises in value the vendor may obtain the benefit of the increase by breaking his own contract, as by putting it out of his power to fulfill it. If the rule of substantial damages alone applies, the vendor, when the property has fallen in value, may keep the purchase money and the lot by repaying only the decreased value of the lot. The law will not permit a party to so speculate and reap a profit by violating his contract. We think the true rule to be that the law reposes in the innocent vendee an election either to treat the contract as rescinded and recover back what he has paid, or to ask damages for the breach. In this case he relied on rescission, pleaded the payments made, and asked judgment therefor, thus exercising that election.

The defendants next invoke the doctrine that where time is not of the essence of the contract, and the vendor is not able to make a good title at the time the contract ought to be performed, nevertheless a court of equity will afford him relief if he subsequently perfect his title and tender a good conveyance before decree. The general principle has been several times recognized by this court. (*Filley v. Duncan*, 1 Neb., 134; *King v. Gsantner*, 23 Neb., 797.) This proposition is met in the present case by substantially two arguments. The first is that this is an action by the vendee after rescission, and not a suit for specific performance; the second, that specific performance will not be decreed unless the party seeking it has been ready, prompt, and eager in the performance of his part. As to the first argument, it is sufficient to say that the Code recognizes no distinction between proceedings at law and in equity. The defendant may interpose an equitable defense. In this case the defendants set up the facts in their answer and prayed that the plaintiff

might be required to accept a conveyance. If in an action by the vendor, who failed at the proper time to tender good title, the vendee will be required to accept it when subsequently tendered, there is no reason under our system of practice why the present ability to furnish a good title, and tender thereof, cannot be presented as a defense to the vendee's action for damages. As to the second argument, the rule that a party to enforce specific performance must be ready and prompt on his part yields to the general doctrine that time is not of the essence of the contract, and does not prevail in such cases as this, where the vendor becomes able within a reasonable time to perform, where his contract was not speculative, but entered into in good faith, and when the situation of the other party has not been altered so as to render specific performance unjust to him. One text-writer states the rule as follows: "It is accordingly held that if a substantial ownership exists, though the title be not fully cleared on the appointed day, specific performance may be decreed; and the court may rectify the incidental delay by giving the intermediate rents to the purchaser, and interest on the purchase money to the vendor." (Adams, Equity, 88.) Another says: "Courts of equity will also relieve the party vendor by decreeing a specific performance where he has been unable to comply with his contract according to the terms of it, from the state of his title at the time, if he comes within a reasonable time, and the defect is cured. So if there has been no unnecessary delay courts of equity will sometimes decree a specific performance in favor of the vendor, although he is unable to make a good title at the time when the bill is brought, if he is in a condition to make such a title at or before the time of the decree." (Story, Equity Jurisprudence, 777.) Under the rule as first stated the vendees might in this case fail because they did not show a substantial ownership at the time they should have performed. Under the rule stated by Story this is immaterial. While most of the cases are where there was a

technical defect of title, the rule is usually stated in the language of Story, and *Hepburn v. Dunlop*, 1 Wheat. [U. S.], 179, seems to have been a case where the defect was not simply a defect in the technical legal title. (See *Hepburn v. Auld*, 5 Cranch [U. S.], 262, and *Dresel v. Jordan*, 104 Mass., 407.) However this may be, we think the case of *King v. Gsantner*, *supra*, controls us here. One of the defects in the vendor's title in that case arose from the fact that before plaintiff's grantor had recorded his deed, his grantor had, through inadvertence and mistake, made a deed to a stranger. It was held that a tender of title several months thereafter was sufficient. The point discussed in nearly all the cases is not the character of the defect in the vendor's title, but his good faith and the practicability of awarding specific performance without injustice to the vendee. The findings are that Seaver, immediately on ascertaining that the lot had been conveyed to Ames, entered upon negotiations to reinvest himself with the title, and that before decree he had done so and tendered a conveyance. This seems to be sufficient. (Story, *Equity Jurisprudence*, *supra*; *Hepburn v. Dunlop*, *supra*; *McKinney v. Jones*, 55 Wis., 39; *Mussleman's Appeal*, 65 Pa. St., 480; *Leavitt v. Morrow*, 6 O. St., 71; *Brown v. Haff*, 5 Paige Ch. [N. Y.], 235.) It would seem, therefore, that the vendors brought themselves within the rule.

It is urged that the contract was for a warranty deed from all the defendants; that the other defendants conveyed to Seaver by deed of quitclaim; and that only Seaver's warranty was tendered. The bill of exceptions discloses that on the 13th of June, 1894, the defendants moved to reopen the case and for leave to introduce additional testimony. Such leave was granted and the defendants tendered a warranty deed to Seaver from the other defendants, duly recorded. A general objection to this deed as incompetent, immaterial, and irrelevant was sustained. It is asserted that this tender was not made until after the court had announced its findings. The transcript shows that the findings were made June 26,

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and while the plaintiff objected to reopening the case on the ground that the findings had already been announced, the record does not disclose anything in support of the objection, and we must accept the evidence of the record rather than the inference from this objection not supported by the record.

There is nothing to show that there had been any change in the situation of the parties rendering it unjust to Hall to require him to accept performance, except what can be corrected by allowing him the rental value of the land pending the delay, and awarding costs against the defendants. This, we think, should be the course taken. The judgment of the district court is reversed and the cause is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

T. R. NORCROSS v. G. P. BALDWIN.

FILED MARCH 17, 1897. No. 7177.

Replevin: LIEN: PLEADING. A plaintiff in replevin who claims a special ownership by virtue of a chattel mortgage must, in his petition, allege facts showing his interest in the property in controversy, and also facts which entitle him to the immediate possession thereof.

ERROR from the district court of Gage county. Tried below before BUSH, J. *Affirmed.*

E. O. Kretsinger, for plaintiff in error.

A. D. McCandless and *S. J. Tuttle*, *contra.*

POST, C. J.

This was an action of replevin by the plaintiff in error against the defendant in error in the district court for

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Gage county. There was a verdict below finding that the right of property and right of possession of the property in controversy was in the defendant, and assessing damage against the plaintiff for the wrongful detention thereof, upon which judgment was entered, and from which the latter prosecutes error.

It is in the petition below alleged that the plaintiff therein is entitled to the immediate possession of the property described, by reason of a special ownership or interest therein through a chattel mortgage executed by one Baldwin, but without the statement of any facts entitling him to such possession. It was held in *Camp v. Pollock*, 45 Neb., 771, as the natural and necessary result of the decision in *Musser v. King*, 40 Neb., 892, overruling *Adams v. Nebraska City Nat. Bank*, 4 Neb., 370, that a plaintiff in replevin who relies upon a special ownership by means of a chattel mortgage must allege not only the facts with respect to such ownership, but also facts which entitle him to the possession of the mortgaged property. The authorities cited by IRVINE, C., in *Camp v. Pollock*, *supra*, without doubt support the proposition that where, by the terms of a mortgage, the mortgagor is entitled to possession of the property conveyed, the mortgagee cannot maintain a possessory action therefor against an officer who has levied upon the same as the property of the former. The reasoning there employed is quite as applicable to the case at bar. It follows that the petition fails to state a cause of action, and that the judgment must be

AFFIRMED.

THOMAS W. SHRYOCK ET AL. V. CELIA V. SHRYOCK ET AL.

FILED MARCH 17, 1897. No. 7073.

Insurance: MUTUAL BENEFIT ASSOCIATIONS: BENEFICIARIES. A mutual benefit association whose declared object is "to give moral and material aid to its members by assisting them in business," etc.,

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and "to establish a benefit fund, from which not exceeding \$3,000 shall be paid at the death of a member to whomsoever he shall designate, or if a legatee be not mentioned, then to the heirs at law of the deceased," in the year 1881 issued a certificate of membership to one S. Said certificate is in form similar to those in common use by associations of like character, with the exception of the beneficiary clause, viz.: "It is my will that the benefit fund named in this certificate be paid to ——— legal heirs, subject to revocation or assignment at pleasure on presentation of this certificate to the supreme secretary," etc. The insured, about ten years previous to his death, which occurred in the year 1892, intending to make provision for his parents, indorsed said certificate as follows: "Two thousand dollars of this policy to be paid to my father and mother if living at the time of my death. (Signed) W. B. S." In a proceeding by the widow and daughter of the insured against his father and mother to determine the rights of the parties with respect to the fund realized upon said certificate, *held*: (1.) The act of the insured in directing payment to his father and mother was an original designation, and not a change of beneficiaries within the meaning of the certificate and laws of the association. (*Hanson v. Minnesota Scandinavian Relief Ass'n*, 59 Minn., 123.) (2.) Viewing said transactions as a change of beneficiaries, it sufficiently answers the requirements of the certificate and by-laws in that regard. (3.) If it was necessary to present the certificate to the supreme secretary as a condition precedent to the rights of the insured to designate his parents as beneficiaries thereunder, such presentation will be presumed from the designation actually made, accompanied by an intention to provide for the beneficiaries named and the subsequent payment by the insured during his lifetime of assessments for their benefit.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J. *Reversed*.

The opinion contains a statement of the case.

Beeson & Root, for plaintiffs in error:

The Equitable Aid Union is a mutual insurance company, and the rules applicable to old-line companies do not apply. (*Masonic Mutual Benefit Society v. Burkhart*, 10 N. E. Rep. [Ind.], 79.)

All a beneficiary has during the lifetime of a member who holds the certificate is a mere expectancy which gives no vested rights, but is subject to the will of the person taking out the insurance. Whenever the will of

the assured is satisfactorily manifested that he desires a change, or has made a change of the beneficiary, no matter in what manner, or by what method, the expectancy of the first designated beneficiary is destroyed, and the money should be paid as directed by the deceased. (*Marsh v. American Legion of Honor*, 21 N. E. Rep. [Mass.], 1070; *In re Breitung's Estate*, 46 N. W. Rep. [Wis.], 891; *Anthony v. Massachusetts Benefit Association*, 33 N. E. Rep. [Mass.], 577; *Chandler's Appeal*, 34 Wis., 505; *Brown v. Mansus*, 5 Atl. Rep. [N. H.], 768; *Chapman v. McIlwraith*, 77 Mo., 38; *Griswold v. Sawyer*, 4 Am. R. & C. Cas. [N. Y.], 98; *Grand Lodge v. Noll*, 51 N. W. Rep. [Mich.], 268; *Schmidt v. Knights of Pythias Ins. Association*, 47 N. W. Rep. [Ia.], 1032.)

A. N. Sullivan, contra.

References to question as to change of beneficiary: *Harley v. Heist*, 86 Ind., 196; *Presbyterian Mutual Assurance Fund v. Allen*, 106 Ind., 593; *Duvall v. Goodson*, 79 Ky., 224; *Continental Life Ins. Co. v. Palmer*, 42 Conn., 64; *Union Mutual Aid Association v. Montgomery*, 38 N. W. Rep. [Mich.], 588; *McKinney v. Stewart*, 5 Kan., 392; *Weisner v. Zann*, 39 Wis., 200; *State v. Engle*, 21 N. J. Law, 367; *Bailey v. Bailey*, 25 Mich., 188; *Richards v. Miller*, 62 Ill., 424.

The mention of one method of change of beneficiary excludes all others. (*Holland v. Taylor*, 111 Ind., 127; *Stephenson v. Stephenson*, 64 Ia., 534; *National Mutual Aid Society v. Lupold*, 101 Pa., 111; *Gentry v. Knights of Honor*, 23 Fed. Rep., 718; *Ireland v. Ireland*, 42 Hun [N. Y.], 212; *Knights of Honor v. Nairn*, 60 Mich., 44; *Highland v. Highland*, 109 Ill., 366; *Greeno v. Greeno*, 23 Hun [N. Y.], 478; *Manning v. Supreme Lodge*, 5 S. W. Rep. [Ky.], 385; *Olmsted v. Masonic Mutual Benefit Society*, 37 Kan., 93; *Daniels v. Pratt*, 143 Mass., 216; *Hotel Men's Benefit Association v. Brown*, 33 Fed. Rep., 11; *Coleman v. Knights of Honor*, 18 Mo. App., 189.)

POST, C. J.

This is a petition in error to review a judgment of the district court for Cass county reversing an order of the county court in the settlement of the estate of William B. Shryock, deceased. The primary question of the controversy relates to the disposition of the sum of \$2,805, the proceeds of a certificate of membership held by deceased in the Equitable Aid Union, a benevolent fraternal society issuing insurance to members thereof upon the so-called assessment plan. The object of the order named, according to its constitution, which was introduced in evidence, is " * * * 4. To give all moral and material aid in its power to members, by assisting each other in business, in obtaining employment, and in sickness. 5. To establish a benefit fund, from which not exceeding \$3,000 shall be paid at the death of a member to whomsoever the member shall designate, or if a legatee be not mentioned, then to the heirs at law of the deceased." The certificate in question bears date of February 26, 1881, and is in form substantially similar to those in common use by fraternal and mutual benefit associations, with the exception of the beneficiary clause, which reads as follows:

"To the Officers and Members of the Supreme Union, E. A. U.: It is my will that the benefit fund named in this certificate be paid to — legal heirs, subject to revocation or assignment at pleasure on presentation of this certificate to the supreme secretary of the Equitable Aid Union.
WILLIAM SHRYOCK."

The deceased, who was at the date of said certificate a single man, subsequently married the defendant in error, Celia V. Shryock, and from which union was born the latter's co-defendant, her infant daughter, Lillian J. Shryock. Deceased, previous to his marriage, and ten years or more before his death, over his own signature indorsed said certificate as follows:

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"Two thousand dollars of this policy to be paid to my father and mother if living at the time of my death.

"WM. B. SHRYOCK."

It does not appear affirmatively that the certificate was presented to the supreme secretary upon the execution of the foregoing direction, and the presumption arising from the facts stated will be considered in another connection. The deceased left a will, executed a short time before his death, containing this, among other provisions: "After paying my debts, I wish the following disposition to be made of my property and life insurance: One thousand dollars to be paid to my mother and one thousand dollars to be paid to my father." Said will having been proved as provided by law, the said Celia V. Shryock, Thomas W. Shryock, and Frank E. White in due form qualified as executors, and who, as such executors, subsequently received from the Equitable Aid Union the benefit fund in controversy. The issues below were presented by the separate petitions of the said Celia V. Shryock, in her own right and as guardian of her infant daughter, Lillian J. Shryock, as heirs at law of the deceased, praying to be declared the beneficiaries under and by virtue of the certificate of insurance above mentioned, and for a decree confirming their title in equal shares to the proceeds thereof in the hands of the executors. The plaintiffs in error, Thomas W. Shryock and Rachel A. Shryock, who are the father and mother of the deceased, filed answers, each asserting a claim to \$1,000 of the fund in controversy as beneficiaries under said certificate by virtue of the written direction thereon above set out, and also by reason of the foregoing provision of the last will of the deceased. They alleged, also, certain facts by reason of which, it is argued, defendants in error are now estopped to claim any part of the fund in question, although that contention, in view of the conclusion we are constrained to adopt respecting the other questions stated, will not be noticed further. There was also a proceeding instituted by defendants in error for the removal of the said

Celia V. Shryock as executrix, on account of the alleged contumacy of the latter in refusing to join with the said Thomas W. Shryock and Frank E. White in signing checks in payment of claims allowed against the estate. The county court found upon all of the issues thus joined for the plaintiffs in error, adjudging them to be entitled to the sum of \$1,000 each out of said fund, and entered an order removing the said Celia V. Shryock from her trust as executrix, etc. On appeal from said orders to the district court, the several proceedings having been consolidated by agreement of parties, a trial was had upon the issues herein stated, which, as we have seen, resulted in a finding and judgment for the defendants in error upon all of such issues, and from which the said Thomas W. Shryock and Rachel A. Shryock prosecute error.

In determining the rights of the respective claimants to the fund in question we may dismiss from our consideration the provision made for plaintiffs in error by last will of the deceased. It is clearly established by the evidence that the latter had, at the time of the execution of his said will, \$7,000 or upwards of life insurance, subject to testamentary disposition, beside other property, real and personal, of considerable value, so that it cannot by any permissible construction of said provision be held to convey an interest in this particular policy or certificate of insurance to the exclusion of others. This observation leads to the second and most important subject of inquiry, viz., the effect of the deceased's attempt to designate his father and mother as beneficiaries under the certificate of insurance. That his intention was to so designate them to the extent of \$1,000 each is apparent from the written indorsement and attending circumstances, as to which there is no dispute. Counsel for defendants in error frankly admits that the rules governing life insurance companies proper have no application to mutual benefit associations in respect to the change of beneficiaries. But the right to make such a change,

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it is contended, rests upon contract, and can be exercised only upon the conditions and in the manner prescribed by the certificate of membership and laws of the association. There are, it must be conceded, authorities which appear to support that contention, while others, equal in point of number and respectability, hold that conditions of the character indicated are imposed for the protection of the association, and when it chooses to waive the prescribed formalities a third party will not be heard to complain. We are, however, spared the necessity of reviewing at this time the decisions upon the subject, or of choosing between the conflicting and apparently irreconcilable views therein expressed, first, because the act of deceased in directing payment to plaintiffs in error was not, in our judgment, a change of beneficiaries, but an original designation thereof; second, assuming that it was necessary to present the certificate to the supreme secretary before the rights of plaintiffs in error would attach as beneficiaries thereunder, such presentation will be presumed, in the absence of evidence to the contrary, from the period of ten years and more which elapsed between the date of such designation and the death of the said William B. Shryock. In *Hanson v. Minnesota Scandinavian Relief Association*, 59 Minn., 123, which was a proceeding in the nature of a bill of interpleader, the law of the association provided for payment of benefits to "such person or persons as the deceased may have designated to receive the same, as the same shall appear upon the books of the association," and * * * "if no designation has been made, then the benefit shall be paid to the legal heirs or devisees of such deceased member." It was also provided that every applicant should designate in his application the person or persons to whom, in case of his death, the benefit should be paid, and that any member in good standing might change his beneficiary by sending to the secretary a written application therefor, duly acknowledged before a notary public, and paying a fee of \$1.00. It was further

provided that in case such change was approved by the board of managers, a new certificate should be issued to such member, and that no change of beneficiaries should be made in any other manner than as therein provided. One H., in the month of March, 1882, applied to become a member of the association, and upon being accepted as such received a certificate of membership, without having designated a beneficiary. Some time in the year 1883 or 1884 the insured called in person at the office of the association and verbally notified the general manager that he had designated his four children as his beneficiaries, to whom payment should be made, in case of his death, of the fund realized upon his certificate, of which an entry was made in the books of the association. H. died in the year 1890, leaving surviving him, in addition to the children designated by him as beneficiaries under his certificate of insurance, a widow and daughter. The question therein was, as in this case, the effect of the attempted designation by the deceased of the children, who claimed as his beneficiaries, and the court, by Mitchell, J., referring to that subject, say: "By the 'designation' of a beneficiary, the by-laws evidently refer to the express act of the member specifying and naming some particular person, and by 'changing' beneficiaries they refer to the act of naming and specifying some other person or persons in place of those previously designated. According to this construction of the by-laws, the act of Hanson was an original designation, and not a change of beneficiaries." With the conclusion reached in that case, which is, it must be conceded, directly in point, we are entirely satisfied, and accordingly hold that the provision by the deceased for the plaintiffs in error, his parents, was in no sense a change of beneficiaries, but an original designation thereof within the meaning of the certificate and constitution of the Equitable Aid Union. But viewing the transaction in question as a change of beneficiaries, it sufficiently answers the requirements of the certificate and laws of the association, which, unlike

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any other to which our attention has been called, prescribe no conditions to the exercise by the insured of his right in that regard, except the presentation of his certificate to the supreme secretary. Granting such presentation to have been a condition precedent to the right of deceased to designate plaintiffs in error as beneficiaries, it should, we think, be presumed from the designation in fact made, accompanied by the intention to provide for them and the subsequent payment of assessments for their benefit during the lifetime of the deceased. (2 Wharton, Evidence, sec. 1320; Lawson, Presumptive Evidence, p. 67 *et seq.*; 1 Jones, Evidence, sec. 51.)

As regards the order removing Mrs. Shryock from her trust as executrix, we quite agree with counsel that the judgment of the district court is right and should be affirmed. There is, so far as we can discover, no pretense whatever of misconduct on her part, aside from her refusal to dissipate the fund she was in good faith claiming in her own right, and in behalf of her infant daughter, until advised touching her duty in the premises by order of the court. It requires no argument to prove that such fact does not amount to a breach of her trust for which she was removable on the motion of the county court or the complaint of her co-executors. The judgment is, however, reversed so far as it relates to the disposition of the fund in controversy, and the cause remanded to the district court for further proceedings therein not inconsistent with this opinion.

REVERSED.

HENRY OTTO ET AL. V. ISAAC BURCH ET AL.

FILED MARCH 17, 1897. No. 7072.

Replevin: JUDGMENT: APPEAL: DAMAGES. B. and K., as agents for G., took possession of personal property by virtue of a mortgage executed by O. In an action of replevin by the latter for the

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recovery of said property, before a justice of the peace, judgment was entered for the return thereof or the value of defendant's possession, being the amount of the mortgage debt. From said judgment O., upon the giving of an undertaking in due form, prosecuted an appeal to the district court, where defendants also recovered judgment for the return of the property or the value of their possession. Afterward, O. having failed to return the property, G. recovered the same by means of an action of replevin in his own name, under and by virtue of his mortgage, upon which, after foreclosure in the manner therein provided, the proceeds of said property was applied. In a subsequent action by B. and K. upon the appeal undertaking given by O., *held*, (1) that the judgment in the original action was, in consequence of the privity between the defendants therein and G., their principal, satisfied except as to damages and unpaid costs by the delivery to the latter in the subsequent action of the mortgaged property, and the disposition thereof by him in accordance with the terms of his mortgage; (2) a defendant to whom in an action of replevin has been awarded a return of the property or its value, or the value of his possession, is not himself required to resort to an action of replevin in order to reap the fruits of the judgment in his favor. But if, instead of pursuing his remedy upon the bond given for his protection, he recovers the property by reason of his original title, he will be held to have waived his right to the alternative relief.

ERROR from the district court of Gage county. Tried below before BABCOCK, J. *Reversed*.

A. Hardy, for plaintiffs in error.

Griggs, Rinaker & Bibb, *contra*.

POST, C. J.

This was an action upon an appeal undertaking executed by Henry Otto as principal and the other defendants, Bartling and Kees, as sureties, which resulted in a judgment for the plaintiff in the district court for Gage county, and from which the defendants therein prosecute error.

The facts essential to an understanding of the decisive question of the controversy are as follows: Otto, the principal defendant, in the month of April, 1889, executed in favor of James W. Graham his two promissory

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notes for \$80 each, payable July 1 and December 1, after date, secured by a mortgage upon a certain span of mules. Subsequently, the note maturing July 1 being due and wholly unpaid, the defendants in error, as agents for Graham, took possession of said mules by virtue of the mortgage, which they were proceeding to foreclose by means of notice and sale, when said property was taken from them under a writ of replevin issued by a justice of the peace in a suit by Otto, the mortgagor. A trial before the justice resulted in a judgment for the defendant therein for a return of the property, or in case return thereof could not be had, for \$165.98 damage, the value of the defendant's possession, and which was, upon the execution of the undertaking here involved, removed by appeal into the district court. Upon the perfecting of said appeal a trial was had in the district court, which also resulted in a judgment for the defendants for a return of the property, or in case return thereof could not be had, for the value of the defendants' possession, assessed at \$84.10. Thereafter, to-wit, in the month of August, 1891, said property not having been returned in accordance with the order of the district court, and execution upon said judgment having been returned unsatisfied, Graham, in his own name, commenced an action of replevin against Otto, alleging that he was entitled to the possession of said property by virtue of the mortgage above described. The suit last mentioned was prosecuted to final judgment in favor of the plaintiff therein, to whom the mortgaged property had in the meantime been delivered under the writ of replevin, and who thereafter proceeded to foreclose his said mortgage by notice and sale of the property therein described. It appears from admissions in the record that the proceeds of said sale, after deducting costs and expenses, did not exceed the amount of the note maturing December 1, 1889, upon which it was by the mortgagee applied, leaving the defendants below liable, as here claimed, upon their appeal undertaking for the amount of the note first maturing,

with costs of suit. In that view the district court concurred, judging from instructions given and refused, apparently upon the theory that the judgment in the first mentioned suit is conclusive in so far only as it relates to the note maturing previous to commencement thereof. It is, on the other hand, contended that the right of defendants in error to a return of the property, or for the value of their possession, was inseverable and exhausted by the final judgment in their favor, although no provision was made for declaring the entire debt due upon the mortgagor's failure to pay the first note at maturity. It is further contended that said judgment was, in consequence of the privity between the defendant in error and Graham, satisfied, except as to damages, assessed at \$4.10, and unpaid costs, by the delivery to the latter of the mortgaged property in the subsequent suit and the disposition thereof by him in accordance with the terms of his mortgage. There is, it seems to us, much force in that contention. Graham, the party in interest, has had the benefit of the mortgage security, the proceeds thereof have been applied by him upon Otto's indebtedness in conformity with the terms of the contract, and we are aware of no principle which can be invoked to sustain a judgment in addition thereto upon the appeal undertaking of the latter for the amount of such indebtedness. That an action will lie on the appeal undertaking of the plaintiff in replevin, to whom the property has been delivered, upon his refusal to return the same after final judgment for the defendant, upon which execution has been returned unsatisfied, is not doubted. The party to whom has been awarded a return of the property, or its value, or the value of his possession, as the case may be, provided a return thereof cannot be had, is not required to resort to an action of replevin in order to reap the fruits of the judgment in his favor. But where, as in this instance, instead of pursuing his remedy upon the appeal undertaking, he recovers the property by means of an action of replevin by reason of his original title

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or right of possession, he will be held to have waived his right to the alternative relief. The fact that it was Graham, the mortgagee in the case at bar, instead of the defendants in error, as his agents, who resorted to the process of the court in order to recover the property cannot be regarded as material. It is sufficient, as already intimated, that he, Graham, recovered such property while the judgment for his benefit was in force, and disposed of it in this manner and for the purpose contemplated by the mortgage. Although we have been referred to no case arising out of a state of facts precisely similar to those here involved, the principle which must govern in the determination of the question presented was distinctly recognized in *Rinker v. Lee*, 29 Neb., 783. In the case cited, which was a suit below upon a replevin bond executed by Rinker as plaintiff in favor of Lee as defendant, it was shown that the property in controversy was, subsequent to the delivery thereof to the former, taken from his possession and delivered to Lee by means of a writ of replevin in an action wherein one Bentley was plaintiff and the said Rinker was defendant. The court, by NORVAL, J., in commenting upon the foregoing facts when urged as a defense by Rinker in the action upon his undertaking, said: "The condition of the replevin undertaking is 'that the said Avalon R. Rinker, plaintiff, shall duly prosecute his action, and pay all the costs and damages which may be awarded against him, and shall return said property to said defendant in case judgment for the return thereof shall be rendered.' The damages and costs recovered in the replevin suit have been paid. When the property came again into the possession of Lee, the condition of the replevin bond to return the property was fulfilled. The mules having been taken from the possession of Rinker and delivered to the plaintiff, makes it impossible for the defendants to literally comply with the judgment for their return. It appearing that during the pendency of the replevin suit the property came into the possession of Lee, in as good condition and

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as valuable as when replevied, he cannot afterward maintain an action for its value." In addition to the cases cited in support of the conclusion there reached, our attention is directed to *Harrow v. Ryan*, 31 Ia., 156, in which it was held that where property replevied is restored to the possession of the defendant before the determination of his rights with respect thereto, such fact will defeat his claim for the value of the property in an action on the replevin bond, whether the restoration be through the act of the plaintiff or by means of legal process.

The recovery by Graham of the property under the mortgage, and the disposition thereof by him, amounted, as we have seen, to a satisfaction of the judgment in the replevin suit, except as to unpaid costs and damages. It follows that the district court erred in permitting the defendants in error to recover upon the replevin bond for the value of their possession as determined in the replevin suit, for which the judgment must be reversed and the cause remanded to that court.

REVERSED.

GEORGE W. DOUGLAS, APPELLANT, v. WILLIAM T.
SMITH, APPELLEE.

FILED MARCH 17, 1897. No. 7176.

Review: QUESTIONS OF FACT: BILL OF EXCEPTIONS. One desiring to secure a review in this court of a ruling upon a question of fact is required to preserve the evidence by means of a bill of exceptions, allowed in the manner provided by law.

APPEAL from the district court of Webster county.
Heard below before BEALL, J. *Affirmed.*

A. M. Walters, for appellant.

J. S. Gilham, contra.

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Post, C. J.

This was a proceeding by the plaintiff, George W. Douglas, in the district court for Webster county to foreclose a certain real estate mortgage executed by Smith, the defendant. An answer was filed admitting the execution of the note and mortgage, and alleging as a defense thereto usury and payment in full, and which allegations were put in issue by the reply. A final decree was entered upon a finding in substantial accord with the allegations of the answer, and from which the plaintiff appeals.

No claim is made at this time that the decree is unsupported by the pleadings, the sole ground upon which a reversal is sought being the alleged insufficiency of the evidence. A paper purporting to be a bill of exceptions was at a previous term stricken from the files, on the ground that it was not allowed within the time or by any person authorized by law. The record accordingly presents for determination no question of law or fact, and the decree will therefore be affirmed. It is a rule settled by an unbroken line of decisions in this state that the unsuccessful party must preserve the evidence by means of a bill of exceptions in order to secure a review in this court of rulings upon questions of fact.

AFFIRMED.

J. L. MOORE, APPELLEE, V. MONTGOMERY POLLOCK ET AL., APPELLANTS.

FILED MARCH 17, 1897. No. 7109.

1. **Agency:** COLLECTIONS: PAYMENT. An agent employed to make collection of commercial paper is, as the result of that relation, authorized to receive in payment thereof such coin or currency only as is by law declared to be a legal tender, or which is by common consent treated as money, and, in commercial transactions, passes as such at par.

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2. ———: ———: ———. The defendant, desiring to pay and satisfy a note and mortgage for \$1,000 then about maturing, executed in favor of a local investment company a note and mortgage for \$1,500, and received from T., the manager of said company, the sum of \$465, the latter agreeing to pay off the first mentioned note and mortgage, then held by the plaintiff in the state of Massachusetts. He also, without the knowledge or consent of the plaintiff, charged the local company upon its books, with the amount of said note, to-wit, \$1,035, and entered a corresponding credit in favor of a Massachusetts corporation authorized to receive payment thereof. No money passed by the transaction, except as above stated, and the local company subsequently passed into the hands of a receiver, after having negotiated the \$1,500 note and without having paid or accounted for the balance of the proceeds thereof. *Held* not to sustain the plea of payment.

APPEAL from the district court of Dodge county.
Heard below before MARSHALL, J. *Affirmed.*

Frick & Dolezal, for appellants.

Munger & Courtright and *G. G. Martin*, *contra.*

POST, C. J.

On the 8th day of October, 1885, Montgomery Pollock and wife borrowed the sum of \$1,000 through one Toncray, acting as agent for the Dakota Mortgage Loan Corporation, hereafter called the "Dakota Company," and on said day executed and delivered to Toncray their negotiable note or bond in the principal sum above named, payable to the order of said Dakota Company October 1, 1890. Accompanying said note or bond were coupons, also executed by the Pollocks, for the semi-annual interest upon the principal debt, all payable at the office of the said corporation in Boston, Massachusetts. The Pollocks, in order to secure said bond and coupons, on the day first mentioned executed in favor of the payee therein named a mortgage upon the southeast quarter of section 10, township 17, range 9 east, in Dodge county. On the 17th day of November, 1885, the Dakota Company duly sold and transferred said bond and coupons to Fanny C. Palmer, who thereafter indorsed the same to Moore, the

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plaintiff herein, as trustee, and who prosecutes this action for her benefit. Subsequent to the transactions above noted the Globe Investment Company succeeded to all the rights of the Dakota Company, the principal office and place of business of said corporations being the same, to-wit, Boston, Massachusetts, with a branch office at Kansas City, Missouri. Some time after the execution of the mortgage which is the subject of this controversy the Nebraska Mortgage & Investment Company, hereafter called the "Nebraska Company," was organized and succeeded to the business of Toncray, who thereafter acted as the managing officer of said company. Said last named company, as claimed by appellants, became, upon its organization, the agent of the Globe Investment Company for the purpose of making collections of principal and interest of loans negotiated by Toncray, including the loan in controversy for the Dakota Company, and also for the said Globe Investment Company. It is shown that both Toncray and the Nebraska Company made frequent collections for the Globe Investment Company, and that the accruing interest on the loan in question, as the same became due and payable, was collected by one or the other of said parties at their place of business, in Fremont, and remitted to the said Globe Investment Company at Boston, or to the latter's branch office at Kansas City. On the maturity of the principal debt, in the month of October, 1890, the Pollocks arranged to pay and discharge the same by means of a new loan, to be negotiated by Toncray. Pursuant to that arrangement, the Pollocks executed in favor of the Nebraska Company a bond and mortgage for \$1,500, payable October 1, 1895, with interest from date at the rate of six per cent per annum. On the delivery of the last mentioned securities to Toncray the latter paid to the mortgagors named the sum of \$465, but whether by means of his personal check or the check of the Nebraska Company does not clearly appear. He also credited the Globe Investment Company with the sum of \$1,035 on the books of the Nebraska

Company, under date of October 4, 1890, and at the same time entered a corresponding charge against the last named corporation. The money was, however, never remitted by the Nebraska Company, which, subsequent to the transaction last mentioned, passed into the hands of a receiver, and is now insolvent. In the month of July, 1891, the second note and mortgage were by the Nebraska Company sold and transferred to Frances E. Walker, who is made a party to this action, and who has filed herein a cross-bill praying for a foreclosure of her said mortgage. Upon proof of facts substantially as above stated the district court for Dodge county found the issues in favor of the plaintiff, and entered a decree of foreclosure in accordance with the prayers of the petition and cross-bill, from which, so far as it relates to the plaintiff's cause of action, the Pollocks appeal.

It may, we think, be fairly assumed from the foregoing statement that the relation between the plaintiff and the Nebraska Company was that of principal and agent with respect to the interest coupons. It may also be conceded, for the purpose of the present inquiry, that said company was, when the principal debt matured, authorized to receive payment thereof in behalf of the plaintiff in the usual course of business, even in the absence of the evidence of such indebtedness; but does it follow therefrom that said company could bind the plaintiff by accepting in satisfaction of the said claim a note and mortgage payable to its own order five years thereafter, and which would require the advancement by him or his *cestui que trust* of fifty per cent of the face value of his security? To that question the books furnish a ready answer in the proposition that an agent employed to make collection of commercial paper is not, as the result of such relation alone, authorized to receive in payment thereof anything but money, which, however, as said in *State v. Hill*, 47 Neb., 456, includes not only legal tender coin and currency, but any other circulating medium, instruments, or tokens in general use in the commercial world as the rep-

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representative of value. A reference in this connection to a few of the many cases in point will serve to illustrate the foregoing proposition.

Scott v. Gilkey, 153 Ill., 168, was a case in which a bank holding notes for collection accepted therefor other notes of the maker, payable to its own order at a future date, and surrendered the first mentioned notes, marked paid. At the same time it credited the payee's account with the amount of his notes, although no money passed in the transaction. It was held not to amount to a payment and the payee was permitted to recover.

In the recent English case of *Hine v. Steamship Insurance Syndicate*, 11 The Reports [Eng.], 777, it was held that an agent authorized to demand payment on behalf of his principal can receive money only, and payment by means of a bill of exchange drawn by the agent and accepted by a debtor of the principal, payable three months after date, was held not within the authority of the former and not binding upon the principal, although said bill was immediately discounted and honored at maturity.

Ward v. Smith, 7 Wall. [U. S.], 447, was a case in which a bank holding for collection certain securities payable at its office accepted in satisfaction thereof depreciated bank notes, but the court, referring to the foregoing facts when relied upon as a defense to an action on such securities, said: "That the power of a collecting agent, by the general law, is limited to the receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money and passes as such at par, is established by all the authorities." (See, also, *Lochenmeyer v. Fogarty*, 112 Ill., 572; *Merchants Nat. Bank of Philadelphia v. Goodwin*, 109 Pa. St., 422; *Graydon v. Patterson*, 13 Ia., 256; *Aultman v. Lee*, 43 Ia., 404; *Scully v. Dodge*, 40 Kan., 395; *Robinson v. Anderson*, 106 Ind., 152; *Mechem, Agency*, sec. 375, and cases cited.)

Counsel for appellants, however, remind us of our duty

to look at the substance rather than the form of the transaction in order to determine whether the act of Toncray, as manager of the Nebraska Company, was *ultra vires*, or within the scope of the authority of such corporation as the plaintiff's agent, and in the course of the argument make use of this forcible illustration: "Suppose that Pollock, instead of receiving from Toncray \$465 only, had received a check for the full sum of \$1,500, which he immediately cashed, and after handing to the latter the amount of plaintiff's mortgage, \$1,035, retained the balance of \$465. No one would claim that the transaction was not a full and complete payment. Did, then, the fact that Mr. Pollock made a new loan, from the proceeds of which the note in question was to be paid, under the circumstances of the case, alter the character of the transaction and render it any the less a payment?" If we accept as true the premises from which counsel argue, we must be prepared to accept their conclusion; but the fallacy of that reasoning lies in the assumption, wholly unwarranted by the record, that there was, aside from the \$465 above mentioned, any money passed or any credit transferred by means of the transaction involved, either from Pollock to the Nebraska Company or from said parties, or either of them, to the plaintiff. Toncray, it is true, credited plaintiff's agent, the Globe Investment Company, with the amount of Pollock's note on the books of the company of which he was manager; but the making of such entry was altogether gratuitous on his part, and if within the scope of his authority as agent for that corporation, it was certainly ineffective for the purpose of binding the plaintiff or the beneficial owner of the note. Mere book-keeping alone between the Globe Investment Company and the Nebraska corporation will not change the actual status of the parties or destroy rights which arise out of the real facts of the transaction. Indeed, the transaction in controversy, when tested by a final analysis, proves no more than that the Nebraska Company, as Pollock's agent, was by the latter entrusted with the sec-

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and note for the purpose of negotiating the same, and with the understanding that it would from the proceeds thereof pay and discharge his prior note and mortgage. And the wrong to him of which mention is made by counsel, however much to be deplored, results from the negligence or fraud of his chosen agent, with which the plaintiff is in no sense chargeable. It follows that the decree is right and must be

AFFIRMED.

EAST OMAHA STREET RAILWAY COMPANY V. LEWIS N. GODOLA.

FILED MARCH 17, 1897. No. 7126.

1. **Street Railways: PERSONAL INJURY: CONTRIBUTORY NEGLIGENCE.** It is not such negligence for a passenger to stand upon the platform of a crowded street car while in motion as will *per se* defeat a recovery for injuries received in consequence of the negligence of the persons in charge thereof. (*Pray v. Omaha Street R. Co.*, 44 Neb., 167.)
2. ———: **CARE AND SKILL.** Street railway companies are, in this state, common carriers, and as such are required to exercise more than ordinary skill and precaution in order to insure the safety of passengers upon their trains. (*Spellman v. Lincoln Rapid Transit Co.*, 36 Neb., 890.)
3. ———: **COMMON CARRIERS.** A street railway company, by undertaking the transportation of passengers for hire, assumes toward its patrons the relation of a common carrier, without regard to the character of the easement possessed by it in its right of way.
4. **Foreign Laws: PRESUMPTIONS.** As a general rule the laws of sister states are, in the absence of proof upon the subject, presumed to be the same as our own.
5. **Street Railways: NEGLIGENCE: PERSONAL INJURY: DAMAGES: JUDGMENT AGAINST CARRIER.** Evidence examined, and held to sustain the verdict and judgment complained of.

ERROR from the district court of Douglas county.
Tried below before KEYSOR, J. . *Affirmed.*

V. O. Strickler, for plaintiff in error.

William F. Gurley and Frank T. Ransom, contra.

Post, C. J.

The East Omaha Street Railway Company, hereafter called the defendant, is engaged in operating a suburban railway by means of electricity, the initial point of its line of road being Sherman avenue, near the eastern boundary of the city of Omaha, and its terminus at Courtland Beach, between four and five miles distant. From Sherman avenue the course of the defendant's track is due east, along what is described as Locust street, to a point about midway between the city and the Missouri river, from whence it extends north to Courtland Beach. On the 6th day of August, 1893, as alleged by the defendant in error, hereafter called the plaintiff, he took passage upon one of the defendant's trains at Courtland Beach for Omaha, and that the said defendant, in consideration of the usual fare therefor, undertook to safely carry him to his aforesaid destination; that the train upon which the plaintiff had taken passage was greatly crowded, as the defendant's servants well knew, yet notwithstanding such fact, and in disregard of their duty to the plaintiff and the other passengers thereon, the conductor and motorman in charge of said train negligently and carelessly caused the same to be run into and upon the curve of the defendant's said track at Locust street at an unusual and dangerous rate of speed, whereby the plaintiff was thrown from said train, in consequence of which he suffered personal injury, to his damage, etc. The plaintiff recovered in the district court upon the cause of action stated, and the defendant prosecutes error.

The allegations of the answer will sufficiently appear from our discussion of the questions presented by the brief and argument by counsel for the defendant.

It is first insisted that there is a failure of proof to sustain the allegation of negligence, and that the speed of

defendant's train at the time of the injury was both reasonable and necessary, in view of the circumstances of the case. But, as said by counsel for plaintiff, men in human affairs judge largely by results; and when, as is clearly shown by the record herein, a motor train, crowded inside and out with passengers, is run into a curve with such force as to toss persons seated within to the opposite side of the car, and to throw others from the platforms of the motor and trailer to the ground while striving to maintain their positions thereon, a finding of negligence fails to strike the judicial mind as either unreasonable or unwarranted.

In this connection a brief reference to evidence may not be out of place. Sergeant Whalen, a police officer of the city of Omaha, testified that he lost his hold upon the front platform of the trailer and was thrown off when the train struck the curve. Arthur Creighton, who was sitting upon the dash-board of the trailer and holding with his right hand to the hood of the car, was, as he testified, thrown over the head of a friend and lit upon the ground ten or fifteen feet distant. Dr. Carpenter testified that as the train struck the curve he saw several men flying through the air and was being thrown off himself. John W. Parr, when asked about what occurred when the train reached the curve at Thirteenth and Locust streets, answered: "I don't know what street it is, but where they throwed everybody off." Philip McLarnen was asked, "What occurred when you got to that point?" meaning the curve in question, replied: "They went around that curve at a pretty good hickory. There were several of them took a tumble; they rolled off like pumpkins." Mr. Lloyd, who with his wife and son was seated inside the motor, testified that he was thrown to the opposite side of the car, and that the passengers were in a state of commotion. There was evidence tending to prove that the speed of the train when it struck the curve was from twelve to fifteen miles an hour. Mr. Gray, the conductor in charge, testified that he was running from

seven to ten miles an hour, and admitted that it was unsafe to go around the curve in question at a rate of speed exceeding five miles an hour. It is true the foregoing statements are in part contradicted by the witnesses for the defendant, but the evidence, under the well established rule of this court, is, to say the least, quite sufficient to sustain the verdict upon the issue of negligence in the operation of the train. The plaintiff was not, as a matter of law, guilty of contributory negligence in riding upon the platform of the motor. (*Germantown P. R. Co. v. Walling*, 97 Pa. St., 55; *Nolan v. Brooklyn City & N. R. Co.*, 87 N. Y., 63; *Topeka City R. Co. v. Higgs*, 38 Kan., 379; *Matz v. St. Paul City R. Co.*, 52 Minn., 159; *Geitz v. Milwaukee City R. Co.*, 72 Wis., 307; *City R. Co. v. Lec*, 50 N. J. Law, 438; *Uplam v. Detroit City R. Co.*, 85 Mich., 12.) It is, on the other hand, as said in *Pray v. Omaha Street R. Co.*, 44 Neb., 167, evidence of negligence on the part of a street railway company to carry passengers greatly in excess of the seating capacity of its trains, and permitting them to stand upon the platforms and steps of its cars. Again, street railway companies are, as was held in *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb., 890, and *Pray v. Omaha Street R. Co.*, *supra*, common carriers, and, as such, are bound to exercise more than ordinary skill and precaution in order to insure the safety of passengers upon their trains. The question of the plaintiff's alleged contributory negligence was fairly submitted to the jury, and the finding upon that issue will not be disturbed in this proceeding. This case is, upon the evidence adduced, clearly within the rule recognized in the authorities above cited. The plaintiff's witnesses agree that the train in question was crowded to its utmost capacity, not only the space inside the cars, but the platforms of the motor and trailer. It is further shown that the defendant was in the habit of permitting passengers to stand in the aisles and upon the platforms of its cars, and that Mr. Lazarus, who at the date named was acting in the capacity of assistant superintendent, or train

dispatcher, was present and personally gave orders for the starting of the overcrowded train. True, there was evidence tending to prove the presence of a printed card notifying passengers not to stand upon the platforms, but there was, on the other hand, evidence that the card above mentioned was not posted until after the accident which resulted in the injury complained of. It is also claimed that the conductor protested against the appropriation of the platform by passengers; but upon that point, also, the evidence is conflicting, and, as we have said, sufficient to sustain the verdict.

Complaint is made of the exclusion of evidence to prove that the defendant's line of road is constructed upon private property. The purpose of the evidence offered was, if we understand the position of counsel, to prove that the defendant company is not liable as a common carrier; but that proposition is not, it seems to us, entitled to serious consideration. The defendant, by undertaking to transport passengers for hire between Courtland Beach and the city of Omaha, assumed the relation toward its patrons of a common carrier, and the character of the easement in the right of way is wholly immaterial. (*Vide* Bouvier, Law Dictionary, title "Commercial Carrier;" Lawrence & Rapalje, Law Dictionary.)

The defendant offered to prove that the point where the accident occurred is within the state of Iowa, and which evidence was, upon the objection of the plaintiff, rejected. It does not appear from pleading or proof that the laws of Iowa recognize a different rule of liability from that which governs in this state, and in the absence of proof to the contrary the laws of that state are presumed to be the same as our own. (*Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb., 374.)

Exception was taken to the exclusion of a written report of the accident by the witness Gray, as conductor, made shortly thereafter, and which was, it is claimed, admissible for the purpose of impeachment, the execution thereof having been admitted by the witness upon his

cross-examination. Our impression at the argument was that the statement was admissible for the purpose offered, and that its exclusion was prejudicial error, but after carefully examining it in connection with the testimony given by the witness named, we are unable to perceive any substantial conflict therein, and conclude that the defendant has no just ground of complaint on account of the ruling assigned.

There are further assignments which relate to the giving and refusing of instructions, but since the questions therein presented have been noticed in the discussion of other assignments, they do not require extended notice in this connection. There is no error in the record and the judgment is

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to pay the obligees thereof the damages sustained by reason of the attachment, "if the order be wrongfully obtained." *Id.*

4. An attachment bond is valid without the signature of the attaching plaintiff, and where he does not sign the bond he is not liable thereon to defendant in attachment. *Storz v. Fincklestein* 177
5. In an action on an attachment bond, where the answer is a general denial of the averments of the petition, the burden is upon the plaintiff to show that the attachment was wrongfully issued. *Id.*
6. In an action on an attachment bond where the answer was a general denial, an instruction which permitted the jury to return a verdict for plaintiff upon finding that the attachment was merely dissolved, *held* erroneous. *Id.*

Lien.

7. A creditor who attaches a chose in action acquires only a lien upon the interest which the defendant in the attachment suit had therein at the time the chose in action was seized. *Hartford Life & Annuity Ins. Co. v. Cummings*..... 242

Affidavits.

8. A statement in an affidavit for attachment that the action is one "upon an account for goods sold and delivered by plaintiff to defendant at his request," *held* sufficient to show that the action was one in which an attachment might issue, and to give the court jurisdiction of the attachment suit. *Grotte v. Nagle* 363
9. Where the claim appears from the statements of the affidavit to be one for which an attachment is authorized, but its nature is not fully set forth, reference may be had to the petition. *Id.*
10. An attachment affidavit must contain a statement of the nature of plaintiff's claim. *Id.*
11. *Held*, That the court did not err in overruling a motion to discharge the attachment on the ground that the affidavit did not state the nature of plaintiff's claim as contained in the amended petition. *Id.* 361
12. It is not ground for the discharge of an attachment that some portion of the sum stated in the affidavit is not due. *Id.*
13. A slight variance between the amount stated in the affidavit and that actually due, *held* immaterial. *Id.*

Evidence.

14. Proof in attachment suit *held* sufficient to support the finding of the court sustaining the attachment. *Id.*
15. Evidence *held* sufficient to sustain findings and judgment for plaintiff. *Id.* 365

Jurisdiction.

16. Jurisdiction over attached property is not lost by failure to serve process in the main case so long as the action remains pending. *Rachman v. Clapp* 648

- Attorney and Client.** See EVIDENCE, 10-12. JUDGMENTS, 2.
- Attorneys.** See TRIAL, 3, 4.
 Review of proceeding whereby defendant was disbarred. *Blodgett v. State*..... 121
- Attorneys' Fees.** See INSURANCE, 12. WILLS, 4.
- Attorneys' Liens.** See INTERVENTION.
 An attorney's lien cannot be enforced where there is nothing to which it can attach. *Yeiser v. Lowe*..... 310
- Attornment.** See LANDLORD AND TENANT, 1, 2.
- Auditor of Public Accounts.** See STATE.
- Australian Ballot Law.** See ELECTIONS.
- Banks and Banking.** See CHECKS. TRUSTS. USURY.
Collections.
1. A bank which undertakes the collection of a customer's check is guilty of negligence in sending it for payment direct to the drawee bank, provided there is in the same town another bank in good standing. *Western Wheeled Scraper Co. v. Sadilek* 105
 2. The legal title of commercial paper indorsed "for collection" passes to the indorsee only so far as to enable him to demand and enforce payment thereof. *Branch v. United States Nat. Bank of Omaha*..... 470
 3. The owner of paper indorsed "for collection" may control the same until paid in full, and may intercept the proceeds thereof in the hands of an intermediate agent. *Id.*
 4. The mere crediting of the account of the remitting bank by a correspondent employed by it to make collections does not create in favor of the latter such an equity as can be interposed in defense of an action by the owner of the paper so collected for the proceeds thereof. *Id.*
 5. Evidence held insufficient to prove that the position of appellant, a sub-agent for the collection of commercial paper, has been altered to its damage through the placing of the proceeds of such paper to the credit of the bank from which it was received. *Id.*
Insolvency. Right of Bank.
 6. In a proceeding under ch. 8, Comp. Stats., to wind up an insolvent bank, the corporation remains an interested party and may resist an application for an order conferring upon the receiver authority not within the original order appointing him. *State v. German Savings Bank*..... 734
 7. A proceeding by the receiver of an insolvent bank to collect unpaid subscriptions to its capital stock is one on behalf of creditors of the corporation, and is a "case of claims" against it within the meaning of sec. 4, art. 11, of the constitution, under miscellaneous corporations. *Id.*..... 735
Reorganization. Liability of Successor.
 8. The petition of a creditor of a banking association, which

Banks and Banking—concluded.

disclosed that another bank, as successor, assumed the liabilities of its predecessor, and that plaintiff's claim was one of the unpaid liabilities, *held* to state sufficient facts to entitle plaintiff to relief as against such successor. *Tecumseh Nat. Bank v. Best*.....

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9. Evidence *held* insufficient to show that a national bank, succeeding a banking association, assumed the debts of the association. *Tecumseh Nat. Bank v. Saunders*.....

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Sale of Stock.

10. Evidence *held* sufficient to sustain a decree in favor of a purchaser of bank stock in an action by him to rescind the contract on the ground that he was induced to buy the stock through the seller's false representations as to its value. *Olcott v. Bolton*.....

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Liability of Stockholders.

11. Sec. 35, ch. 8, Comp. Stats., conferring upon district courts power to order the receiver of an insolvent bank to enforce the liabilities of stockholders, refers to liabilities upon their stock. *State v. German Savings Bank*.....
- 734
12. Sec. 4, art. 11, of the constitution, under miscellaneous corporations, makes the liability of subscribers for unpaid subscriptions a secondary liability to be enforced only after the amount of the debts has been judicially ascertained and the corporate property exhausted. *Id.*.....
- 735
13. Sec. 35, ch. 8, Comp. Stats., in so far as it attempts to authorize actions to recover unpaid stock subscriptions before the corporate debts have been judicially ascertained and the corporate property exhausted, is unconstitutional and void. *Id.*

Bastardy.

In a bastardy action it is prejudicial error to admit in evidence, over proper objections, an offer of marriage by the putative father to the mother of the bastard child, made with a view to the settlement of such proceeding about to be commenced. *Lisy v. State*.....

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Bathing Resorts.

1. In a suit against a bath-house company the court erred in directing a verdict for the company, where it failed to search for a missing bather when notified of his disappearance in time to rescue him. *Brotherton v. Manhattan Beach Improvement Co.*.....
- 214
2. A company maintaining a bathing resort and letting out its privileges to the public for hire is bound to take such precautions for the safety of bathers as a person of ordinary prudence would take under the circumstances. *Id.*

Beet-Sugar Bounties. See BOUNTIES.**Beneficiaries.** See INSURANCE, 16-18.**Bill of Exceptions.** See INSTRUCTIONS, 1. REVIEW, 9-20.*Examination and Amendment.*

1. A motion to quash a bill of exceptions, on the ground that it

Bill of Exceptions—*continued*.

- was not presented to the adverse party, or to his attorney, for examination and amendment within the statutory period, should be made within a reasonable time after the bill is filed in the appellate court. *Nash v. Costello*. 325
 2. Where objection to a bill, on the ground that it was not presented to the adverse party within the statutory time, is not made for eighteen months after the filing of the transcript and briefs, the objection will be considered waived. *Id.*
 3. Objection to a bill of exceptions that it was not presented for examination and amendment within the statutory period, not made before the bill was signed and allowed by the trial judge but raised for the first time in the supreme court, will not be considered. *Thompson v. Missouri P. R. Co.* 329
 4. Where a bill is served upon the adverse party after the time therefor had expired, and the parties stipulated in writing that the trial judge should sign and allow the bill, it is a waiver of the objection that the bill was not presented within the time fixed by law or the order of the court. *Id.*
 5. A bill presented for amendment after expiration of the time limited by statute may be quashed where objection to its allowance on that ground was made before the trial judge and promptly renewed by motion in the appellate court before briefs were filed on the merits of the case. *Trumble v. Trumble* 332
- Allowance.*
6. The statute by which the clerk of the district court is allowed to settle and sign a bill of exceptions must be strictly construed. *Scott v. Overall*. 144
 7. In allowing a bill of exceptions, a statement by the clerk in his certificate, that he has knowledge of the absence of the judge, will not take the place of an affidavit required by statute. *Id.*
 8. A stipulation, "It is hereby agreed that the clerk of the district court sign this bill of exceptions, instead of the judge who presided at the trial of this case," held sufficient to authorize the clerk to sign and settle the bill. *Behrends v. Beyschlag* 305
- Authentication.*
9. A bill may be considered upon satisfactory proof of its proper authentication, though the authentication has been lost. *Winters v. Means*. 209
 10. The clerk's certificate of authentication should identify the document as the bill of exceptions. *Behrends v. Beyschlag*. 305
 11. The words, "this bill of exceptions," in a stipulation, held equivalent to an agreement that the document to which the stipulation was attached was a true bill of exceptions. *Id.*
- Contents.*
12. A bill of exceptions must contain all the evidence upon which questions of fact are to be determined, a reference in the bill

Bill of Exceptions—concluded.

to evidence preserved in another bill, in an independent case, not being sufficient. *Tecumseh Nat. Bank v. Best*..... 518

Motion to Quash. Laches.

13. A motion to quash a bill of exceptions which has been duly allowed by the trial judge and properly authenticated, the motion having been made more than a year after the filing of the bill and the transcript in the supreme court, and after the service of briefs in the case, comes too late. *Thompson v. Missouri P. R. Co.*..... 330

Bill of Lading. See CARRIERS, 4.

Bill of Sale. See INSURANCE, 15. SALES, 1.

Bills and Notes. See BANKS AND BANKING, 2-5. CHECKS. NEGOTIABLE INSTRUMENTS.

Board of Transportation. See RAILROAD COMPANIES, 1.

Bonds. See ATTACHMENT, 3-6. MUNICIPAL CORPORATIONS, 12.

Bounties.

- Chapter 1, Session Laws, 1895, providing for sugar bounties, carries no appropriation for payment thereof, and there being no appropriation for that purpose elsewhere, the auditor has no authority to issue warrants in payment of such bounties. *State v. Moore*..... 88

Bridges. See DAMAGES, 4.

Briefs. See REVIEW, 21.

Brokers.

1. A real estate broker employed to make a sale has no claim for commissions until he furnishes a purchaser willing and able to buy the property upon the terms fixed by his principal. *Stewart v. Smith*..... 631
2. Verdict for defendant in a suit by a real estate broker for commissions *held* sustained by the evidence. *Id.*

Burden of Proof. See ATTACHMENT, 5. CONTRACTS, 5. FRAUD, 2. FRAUDULENT CONVEYANCES, 1. INSURANCE, 26. LIBEL AND SLANDER, 2. NEGOTIABLE INSTRUMENTS, 7.

Burglary.

1. Commission of the act in the night-time is an essential element of the crime of burglary. *In re McVey*..... 481
2. Under an information against a person for the crime of burglary, he cannot be convicted of the statutory offense of breaking and entering buildings in the daytime. *Id.*

Carriers.

1. An action against a carrier for failure to deliver goods cannot be maintained by the consignor in the absence of averments that he was the owner of the goods, that he was liable for their loss, or that he had sustained special damage. *Union P. R. Co. v. Metcalf*..... 452

Carriers—concluded.

2. It is the duty of a railroad company to receive and transport to the terminus of its line, and to safely deliver to a connecting carrier, goods offered for shipment and consigned to a place beyond its line. *Fremont, E. & M. V. R. Co. v. Waters*... 592
3. A company receiving for shipment goods consigned to a place on the line of a connecting carrier, under an agreement to transport them to the terminus of its own road, is not answerable therefor after their safe delivery to the connecting carrier named in the contract of shipment. *Id.*
4. Bill of lading examined, and construed as an agreement for the carriage of goods over the defendant's line of road only. *Id.*

Chattel Mortgages. See FRAUDULENT CONVEYANCES, 3. REPLEVIN, 4. TROVER AND CONVERSION.

1. Completed agreement not to file mortgage until financial difficulty of mortgagor made registration necessary to protect interests of mortgagee, the former to notify him of such difficulty, *held* to render the conveyance void as to mortgagor's creditors. *Ackerman v. Ackerman*..... 54
2. A chattel mortgage creates merely a lien and does not pass title to mortgagee. *Robinson v. Kilpatrick*..... 795
Omaha Fire Ins. Co. v. Thompson..... 581

Checks.

1. A customer's bank check is not intended for circulation as a medium of exchange, and should be presented for payment with the dispatch consistent with the circumstances of the case and the transaction of other commercial business. *Western Wheeled Scraper Co. v. Sadilek*..... 105
2. A bank receiving for collection a customer's check is required to pay the same upon the receipt thereof during business hours, or to promptly give notice of its dishonor in order to charge the drawer and indorsers thereof. *Id.*
3. *Held*, From the evidence, that prejudice to drawer of a check would be presumed, where he did not receive prompt notice of its dishonor. *Id.*

Claims. See COUNTIES, 6.

Clerk of District Court. See BILL OF EXCEPTIONS, 8.

Collateral Attack. See COUNTY TREASURERS.

Collections. See BANKS AND BANKING, 2-5.

Commercial Paper. See BANKS AND BANKING, 2-5.

Common Carriers. See CARRIERS. STREET RAILWAYS.

Conflict of Laws.

1. As a general rule the law of another state, in absence of proof, is presumed to be the same as that of the state of the forum. *East Omaha Street R. Co. v. Godola*..... 906
2. There are exceptions to the rule that the laws of another

Conflict of Laws—concluded.

state, in absence of evidence to the contrary, are presumed to be the same as the laws of the forum. *Council Bluffs Savings Bank v. Griswold*..... 753

In absence of evidence to the contrary, it will be presumed that courts of general jurisdiction of another state possess the authority they assumed to exercise, and that the methods of procedure pursued by them are authorized by the laws of that state, though differing from the practice of the forum. *Id.*

Consideration. See HUSBAND AND WIFE, 5. MORTGAGES, 1. SALES, 1.

Conspiracy.

1. A conspiracy may be proved by circumstantial evidence. *Farley v. Peebles*..... 723
2. One means of proof is by showing overt acts of the individuals charged with the conspiracy. *Id.*
3. Declarations tending so directly toward the accomplishment of the alleged common object as to constitute a part of the *res gesta*, are admissible in evidence. *Id.*
4. From the fact that different persons at different times by their acts pursue the same object, the jury may, in connection with other facts, infer the existence of a conspiracy to effect that object. *Id.*
5. In order to justify the admission in evidence of overt acts of individuals it is not necessary to first prove by other evidence the existence of the conspiracy. *Id.*
6. Purposes of evidence of overt acts and of declarations of conspirators. *Id.*..... 724

Constitutional Law. See BANKS AND BANKING, 13. RAILROAD COMPANIES, 1. STATUTES.

To authorize the expenditure of public funds the constitution requires a specific appropriation made by law. *State v. Moore*, 88

Construction. See CONTRACTS, 1, 2

Contempt.

A finding without a judgment in a summary prosecution for contempt of court will not be reviewed by means of a proceeding in error. *Blodgett v. State*..... 121

Contests. See WILLS, 1-3.

Continuance.

1. Affidavits for continuance, to be available on review, must be embodied in the bill of exceptions. *Hans v. State*..... 150
2. In a criminal case, a motion by accused for a continuance on the ground that a witness is absent, may be overruled where the state admits that the witness, if present, would testify as stated in the affidavit in support of the motion. *Fanton v. State* 351
3. A party who obtained one adjournment in a suit before a

Continuance—concluded.

justice of the peace cannot procure another adjournment extending more than thirty days from the return day, on a general affidavit in the language of sec. 960 of the Code, it being necessary for that purpose to comply with sec. 961 of the Code. *Moran v. McCullum*..... 449

Contracts. See CARRIERS, 3. CORPORATIONS, 2. CUSTOM AND USAGE. LANDLORD AND TENANT. MUNICIPAL CORPORATIONS, 14. NEGOTIABLE INSTRUMENTS. SALES. SCHOOLS AND SCHOOL DISTRICTS, 2-4. STATE, 5. VENDOR AND VENDEE.

Construction.

Where a written contract is to be construed with reference to its terms alone, it is the duty of the court to interpret it. *Rosenthal v. Ogden*..... 218

2. Where the construction or application of a written contract depends upon extrinsic facts, it should be submitted with the questions of fact, under proper instructions, to the jury. *Id.*.. 219

Reformation.

3. To justify the reformation of a written contract for mistake, the mistake must be mutual and established by clear, convincing, and satisfactory proof. *Home Fire Ins. Co. v. Wood*.. 381

Agency.

4. *Held*, That a principal who gave a person the exclusive agency for the sale of the former's property for an indefinite period, could revoke the agent's authority any time before sale. *Woods v. Hart*..... 497

Deceit.

5. The burden of proving fraud or misrepresentation in the making of a contract is upon the party alleging it. *Id.*

Public Policy.

6. A stipulation in a contract giving a person the exclusive agency for the sale of the principal's property for an indefinite period does not render such contract void as against public policy. *Id.*
7. A contract for commission sales of intoxicating liquors by one as agent of another, neither of whom has been licensed, is void as against public policy. *Rocco v. Frapoli*..... 665
8. Courts will refuse to enforce contracts which are manifestly contrary to public policy or sound morals. *Id.*

Conversion. See REPLEVIN, 1.

Corporations. See BANKS AND BANKING. GUARANTY.

Stock.

1. One claiming stock by purchase from a cashier who wrongfully used the funds of his bank to buy the stock, *held*, under evidence set out in opinion, not an innocent purchaser for value. *Tecumseh Nat. Bank v. Russell*..... 277
2. *Held*, That a corporation which issued a new certificate to a

Corporations—concluded.

pledgee of original stock, waived its right to rescind the contract with the original holder and cancel the stock on the ground of fraud in its procurement. *Id.*

3. Evidence *held* sufficient to sustain a decree in favor of a purchaser of bank stock in an action by him to rescind the contract on the ground that he was induced to buy the stock through the seller's false representations as to its value. *Olcott v. Bolton*..... 779

Preferences.

4. A corporation may not prefer a debt owing to its own directors, or a debt for which such directors are sureties. *Campbell Printing Press & Mfg. Co. v. Marder*..... 289
5. There is no inflexible rule in existence which, under all conditions, prevents an insolvent corporation from transferring or encumbering its property in good faith and for proper purposes. *Shaw v. Robinson*..... 403
6. An insolvent corporation may, in the absence of actual fraud, prefer one or more of its creditors to the exclusion of others. *Wallachs v. Robinson*..... 469

Service of Process.

7. Where attempt is made to serve a summons upon a corporation, and the persons served are not at the time officers of, or connected with, the corporation, the case is one of total absence of service. *Campbell Printing Press & Mfg. Co. v. Marder*, 283

Enforcement of Claims.

8. One corporation having acquired all the stock of another, and then, through its officers, having procured that other to execute to it a bill of sale of all its assets to secure an existing indebtedness, and there remaining as a consequence of such acts no officers or place of business or tangible assets of such second corporation, *semble*, that another creditor of the second corporation need not procure judgment against it preliminary to an action against the first for the purpose of enforcing its claim against the second. *Id.*

Costs. See INSURANCE, 12. USURY, 5. VENDOR AND VENDEE, 8.

1. Taxation and collection by a justice of the peace of \$1 for a second day's attendance upon the hearing of a motion to dissolve an attachment *held* not illegal. *Gibson v. Sidney*..... 12
2. The right of a litigant to recover costs is a statutory one. *City of Hastings v. Mills*..... 342
3. A plaintiff who recovered a verdict for \$200, only, in the district court in a suit by him against a city for an injury sustained by falling into an unguarded excavation in a street, *held* not entitled to recover costs. *Id.*

Counties. See TAXATION.*Sale of Public Lands.*

1. The determination of whether or not the proposition to sell the public grounds of a county received the required number

Counties—concluded.

- of votes to work its adoption, *held* not a matter for the official determination of the county board. *Stenberg v. State*..... 127
Douglas County v. Keller..... 139
2. Sec. 30, art. 1, ch. 18, Comp. Stats., requiring an affirmative vote of two-thirds of the electors voting to carry a proposition, applies to a proposition to sell the public grounds of a county. *Id.*
3. The authority to sell public lands of the county *held* to depend upon it appearing from the abstract made during the official canvass of the election returns filed with the county clerk, that the requisite number of votes have been cast in favor of the proposition. *Id.*
4. A county board, in attempting to sell public lands, not being required to make findings as to the result of the election on the proposition for a sale, the action of a subsequent board in passing upon claims of the purchasers for repayment of the purchase money on the ground that there was no authority to make the sale, *held* not to involve a review or a reversal of the finding of the former board. *Id.*

Claims.

5. Question of title and of validity of conveyance by commissioners *held* not to deprive the county board of jurisdiction to determine the validity of a sale in passing upon claims for repayment of purchase money. *Id.*
6. The word "claim," as used in sec. 37, art. 1, ch. 18, Comp. Stats., requiring persons having claims against the county to file them with the county clerk, has reference only to claims originating in contract, express or implied. *Douglas County v. Taylor*..... 536
7. One owning city lots abutting on a street, only one-half of which is in the city of Omaha, may recover from Douglas county damages resulting from its action in grading the street in front of the lots, though plaintiff did not file his claim with the county clerk. *Id.*

County Board. See COUNTIES.

County Treasurers.

The authority of a county treasurer to deposit for safe keeping in bank the funds entrusted to his care cannot be questioned in a strictly collateral proceeding. *Western Wheeled Scraper Co. v. Sadilek*..... 106

Courts. See CONFLICT OF LAWS, 2, 3. NEW TRIAL, 1.

1. The original jurisdiction of the supreme court is confined to cases relating to the revenue, civil cases where the state is a party, *mandamus*, *quo warranto*, and *habeas corpus*. *State v. Piper* 25
2. Jurisdiction of the subject-matter of an action cannot be conferred upon a court by consent. *Burkland v. Johnson*..... 859

Covenants. See LIMITATION OF ACTIONS, 1.

Creditors' Bill. See FRAUDULENT CONVEYANCES, 7. HUSBAND AND WIFE, 2.

1. Order subjecting property, conveyed by son to mother, to payment of a claim in favor of a judgment creditor of the son, *held* not sustained by the evidence. *Nat. Bank of Commerce v. Chapman*..... 484
2. A druggist failed in business and confessed judgment on a note in favor of his mother who loaned him money to buy his drug store, and in a contest between her and other creditors seeking to subject to the payment of their claims the proceeds of a sale under execution on the judgment thus confessed, it was *held* that the preference in favor of the mother was not fraudulent. *Clarke Drug Co. v. Boardman*..... 687

Criminal Law. See INDICTMENT AND INFORMATION. INSTRUCTIONS, 1-6. NEW TRIAL, 1.

1. Refusal, before trial, to require the state to elect as to which count of the information it would reply upon, *held* reviewable without being assigned as error in the motion for a new trial. *Hans v. State*..... 150
2. An order in a criminal case permitting the state to withdraw its rest, for the purpose of introducing further testimony, will not be disturbed where an abuse of discretion on the part of the trial court has not been shown. *Id.*..... 151
3. In a prosecution for a misdemeanor it is not essential that the state should prove the commission of the offense on the precise date laid in the information, it being sufficient to establish that the crime was committed within the statute of limitations. *Id.*
4. Where the intention of the accused is a material fact, and he takes the stand on his own behalf, he may be asked directly what was his intention with regard to the act complained of. *Cummings v. State*..... 274
5. A motion by accused for a continuance on the ground that a witness is absent, may be overruled where the state admits that the witness, if present, would testify as stated in the affidavit in support of the motion. *Fanton v. State*..... 351
6. Jurisdiction to pronounce a particular sentence is as essential as jurisdiction of the person and subject-matter. *In re McVey* 481

Criminal Libel. See LIBEL AND SLANDER.

Crops. See DAMAGES, 3.

Custom and Usage.

1. The business usage of a particular individual is not admissible to interpret a contract between that individual and another in the absence of proof of knowledge by the latter of such usage. *Gamble v. Stauber Mfg. Co.*..... 463
2. Evidence showing that it was customary for residents of a city to take possession of streets with the purpose of using

Custom and Usage—concluded.

them temporarily without claiming title, and that the city acquiesced in such possession, *held* properly excluded. *City of Florence v. White*..... 516

Damages. See ASSAULT AND BATTERY. BATHING RESORTS. NEGLIGENCE, 12. PRINCIPAL AND AGENT, 1. REPLEVIN, 1. SALES, 10. SCHOOLS AND SCHOOL DISTRICTS, 2-4. VENDOR AND VENDEE, 2, 6. WATERS, 9.

Grade of Street.

1. Evidence *held* sufficient to sustain a judgment for plaintiff for \$500 in a suit against a county for damages resulting from the action of the county in grading a street in front of plaintiff's lots. *Douglas County v. Taylor*..... 546

Excessive Judgment.

2. The mere fact that a verdict for \$2,865.30 was \$105 in excess of the amount recoverable is not sufficient to show that the jury was influenced by passion or prejudice. *Omaha Fire Ins. Co. v. Thompson*..... 581

Surface Water.

3. In a suit by a land owner against a railway company, the measure of damages resulting from the negligent construction of a ditch through which surface water was discharged on plaintiff's land, was *held* to be the value of crops destroyed, the value of trees destroyed, and the difference in the value of the land immediately before and after the injury. *Freemont, E. & M. V. R. Co. v. Harlin*..... 700

Defective Bridge.

4. Where a bridge in a city collapsed, throwing plaintiff and his horses and loaded wagon into a creek, injuring him and the team and breaking the wagon, a judgment against the city for \$2,500 *held* not excessive. *City of South Omaha v. Powell*.. 793

Personal Injuries.

5. In an action for personal injuries, plaintiff may recover the reasonable value of medical services rendered, not to exceed the expense incurred therefor. *Golder v. Lund*..... 867
6. In a suit for personal injuries, it is not necessary, in order to recover for expenses of medical treatment, to prove by the record that the attending physician was licensed to practice. *Id.*
7. Evidence *held* sufficient to sustain a judgment for plaintiff in a suit against a street railway company for personal injuries resulting from its negligence. *East Omaha Street R. Co. v. Godola*..... 906

Death by Wrongful Act. See MUNICIPAL CORPORATIONS, 2.

Deceit. See SALES, 4, 8-10. VENDOR AND VENDEE,

Declarations. See CONSPIRACY, 3. WILLS, 1-3.

Dedication.

1. Under sec. 106, art. 1, ch. 14, Comp. Stats., an acknowledged

Dedication—concluded.

and recorded plat designating a block within a village as a park, operated as a dedication of that block for a public park. *Ehmen v. Village of Gothenburg*..... 715

2. Where Ehmen acknowledged and recorded a plat designating a block as "Ehmen's Park," it was *held* that such designation did not imply the reservation of the land for the donor's private use. *Id.*

Deeds. See COUNTIES, 5. EMINENT DOMAIN, 3.

The condition in a deed upon which title of lands conveyed for church purposes shall revert to the grantor cannot be invoked by one faction of the grantee to the prejudice of another. *Moseman v. Heitshusen*..... 420

Default. See JUDGMENTS, 1.**Depositories.** See COUNTY TREASURERS.**Description.** See EXECUTIONS, 6. MECHANICS' LIENS, 1-4. MORTGAGES, 7-9. SALES, 5. VENDOR AND VENDEE, 1.**Diminution of Record.** See REVIEW, 60.**Disbarment.**

Review of proceeding whereby defendant was disbarred. *Blodgett v. State*..... 121

Dismissal. See INTERVENTION. REVIEW, 43.

Upon rendering judgment in favor of plaintiff, it was *held* proper to dismiss, without prejudice, the suit as to one item not due which was separately numbered in the petition. *Grotte v. Nagle* 364

Divorce. See WILLS, 6.*Alimony.*

1. The sum allowable to a wife for expenses and counsel fees *pendente lite*, the conditions of payment, and time of making the order, are within the discretion of the district court. *Brasch v. Brasch*..... 73
2. Allowances made by a district court for the temporary support of the wife for expenses and attorney's fees will not be disturbed unless it appears that the court abused its discretion. *Id.*
3. Within the meaning of sec. 12, ch. 25, Comp. Stats., providing for payment of alimony *pendente lite* and costs, an action is pending from its commencement until its final determination on appeal or error, or until the statutory time for review has expired. *Id.*

Attorney's Fees.

4. Under sec. 12, ch. 25, Comp. Stats., the allowance of attorney's fees to counsel of the wife is ancillary to the action for divorce, and a separate suit cannot be maintained against the husband by such attorney to recover for professional services rendered to the wife in the action for divorce. *Yeiser v. Lowe* 310

Drainage. See DAMAGES, 3.

Easements.

To acquire an easement or way on another's land there must be a use of the way for the length of time which will bar an action for the recovery of title to land, and which is under claim of right, or adverse. *Engle v. Hunt*..... 358

Ejectment. See JUDGMENTS, 1.

Averments of an answer attacked by general demurrer *held* sufficient to show the existence and probate of a will through which defendant claimed title. *Koopman v. Carroll*..... 824

Elections. See COUNTIES, 2, 3. MUNICIPAL CORPORATIONS, 12.

Nominations. Secretary of State.

1. Where rival factions of a political party in good faith nominate candidates at conventions called and held in accordance with the usages of the party, and certify such nominations to the secretary of state, he will certify to the several county clerks the names of the candidates nominated by each faction. *State v. Piper*.....26, 39
2. It is neither the province of the secretary of state nor of the court to determine which of two rival state conventions of the same party is entitled to recognition as the regular convention. *Id.*
3. The findings of facts made by the secretary of state in passing upon objections filed against certificates of nomination are *prima facie* right. *Id.*.....25, 39
4. The secretary of state in passing upon objections to certificates of nomination may determine from extrinsic evidence whether the candidates therein named were in fact nominated by a convention called and held according to party usages and claiming in good faith to represent a political party which cast the requisite number of votes at the last election. *Id.*.....26, 39
5. The statutory provisions (Comp. Stats., sec. 136, ch. 26), requiring objections to certificates of nomination for office to be filed within three days after the filing of the certificates, are mandatory, and must be strictly followed, or objections will be deemed waived. *Id.*..... 40
6. The secretary of state in passing upon objections to a certificate of nomination has power to decide from extrinsic evidence whether the candidate named therein was in fact nominated by a convention called and held in accordance with precedents and usages of a party which cast one per cent of the votes at the last state election, or by a faction claiming to represent a party casting one per cent of such vote. *Id.*..... 42

Eminent Domain. See RAILROAD COMPANIES. STREET RAILWAYS, 2.

1. One owning city lots abutting on a street, only one-half of which is in the city of Omaha, may recover from Douglas

Eminent Domain—concluded.

- county damages resulting from its action in grading the street in front of the lots. *Douglas County v. Taylor*..... 536
2. Release of damages resulting from a railroad company's exercise of the right of eminent domain, *held* not to include damages caused by the negligent construction, maintenance, or operation of the railroad. *Fremont, E. & M. V. R. Co. v. Harlin* 698
- Construction of a conveyance granting a railroad company a right of way and releasing the company from liability for damages. *Id.*..... 699

Equalization. See TAXATION, 1.**Equity.** See FRAUDULENT CONVEYANCES, 7. JUDGMENTS, 1. MORTGAGES, 4, 7, 8. TRUSTS.

Where issues have been submitted to a jury, the judgment need not strictly conform to the verdict, but the court may, on determining other issues, enter such judgment as the whole case demands. *Omaha Fire Ins. Co. v. Thompson*..... 580

Error. See REVIEW.**Estoppel.** See ARBITRATION AND AWARD, 9. INSURANCE, 27.

1. Where an insolvent, by confession of judgment, made a preference in favor of his mother who loaned him money, it was *held* that she was not estopped, as against creditors who sold the son goods, from claiming the proceeds of an execution sale under the judgment thus confessed. *Clarke Drug Co. v. Boardman*..... 687
2. A release sufficient to estop the land owner from claiming damages resulting from an exercise of the right of eminent domain would also estop one claiming under him. *Fremont, E. & M. V. R. Co. v. Harlin*..... 698
3. The consent of a bank to the appointment of a receiver *held* not to estop the bank from assailing an order requiring the receiver to sue the stockholders. *State v. German Savings Bank* 736
4. A judgment binds parties and privies. *Otto v. Burch*..... 894

Evidence. See BASTARDY. CONSPIRACY. CONTINUANCE, 2. CONTRACTS, 2. CRIMINAL LAW, 4. CUSTOM AND USAGE, 2. DAMAGES, 2. ELECTIONS, 4, 6. HIGHWAYS, 1, 2. INSURANCE, 13, 16. INTOXICATING LIQUORS, 4. MUNICIPAL CORPORATIONS, 1. NEGOTIABLE INSTRUMENTS, 10. PARTNERSHIP, 3. PRINCIPAL AND AGENT, 7. RAILROAD COMPANIES, 2. REPLEVIN, 3. REVIEW, 22-29. SUMMONS, 2. WILLS, 1-3.**Assault.**

1. In defending, on the ground of self-defense, a civil suit for assault and battery, evidence of plaintiff's quarrelsome disposition must be made by proof of general reputation. *Golder v. Lund* 867

Evidence—continued.

Deed.

2. In a suit against a railroad company for negligently constructing a ditch through which surface water was discharged on plaintiff's land, a right-of-way deed from plaintiff to defendant, containing a release of damages, was held inadmissible. *Fremont, E. & M. V. R. Co. v. Harlin*..... 699

Experiments.

3. Some discretion is conferred upon the trial court in receiving evidence of experiments for the purpose of contradicting or corroborating witnesses. *City of Ord v. Nash*..... 336

Foreign Laws.

4. As a general rule the law of another state, in absence of proof, is presumed to be the same as that of the state of the forum. *Council Bluffs Savings Bank v. Griswold*..... 753
East Omaha Street R. Co. v. Godola..... 906

Judgment.

5. Where the attempted service of a summons was void, the judgment of a justice of the peace, against defendant in the case, held inadmissible in evidence. *Campbell Printing Press & Mfg. Co. v. Marder*..... 287

Parol Evidence.

6. Where, by omission in an insurance policy, the time when the instrument becomes operative is left in doubt, parol evidence is admissible for the purpose of supplying such omission. *Modern Woodmen Accident Ass'n v. Kline*..... 345
 7. A general indorsement of commercial paper may, except as against a bona fide holder, be explained by parol evidence. *Whitney v. Spearman*..... 617

Physicians.

8. In an action for personal injuries it is proper to admit evidence of the actual expense incurred by plaintiff in procuring medical treatment. *Golder v. Lund*..... 867
 9. Proof that one practiced as a physician raises the presumption, in actions between third parties, that he was licensed to do so. *Id.*

Privileged Communications.

10. Communications properly made in negotiating for the employment of an attorney are privileged. *Farley v. Peebles*.... 723
 11. Privileged communications to a lawyer are generally confined to communications made when the relationship of attorney and client existed. *Id.*
 12. Communications voluntarily made to a lawyer after he has informed the communicator that he will not accept the employment to which they relate are not privileged. *Id.*

Witnesses.

13. Where a witness is shown to be absent from the state, his testimony given at a former trial of the same cause is admissible if otherwise unobjectionable. *City of Ord v. Nash*..... 336

Evidence—concluded.

14. Where a witness is absent from the state, the fact that he testified at a second trial of the cause *held* not to render inadmissible, at the third trial, evidence given by him during the first trial. *Id.*

Exceptions. See BILL OF EXCEPTIONS. INSTRUCTIONS, 11, 12. REVIEW, 45. TRIAL, 1.

Exchange. See VENDOR AND VENDEE, 1.

Executions. See CREDITORS' BILL, 2. NEGOTIABLE INSTRUMENTS, 1, 2.

Appraisement.

1. The fact that the certificates of incumbrances were dated subsequent to the advertisement of sale, *held* insufficient to establish the falsity of portions of the record showing by the date of the appraisement and of the copy, by the clerk's filing mark, and by the sheriff's return, that the appraisement was made and filed before the sale was advertised. *Nebraska Loan & Trust Co. v. Barnes*..... 324
2. In absence of fraud an appraisement can be attacked, on the ground that it is too low, only by motion filed before sale. *Griffith v. Jenkins*..... 721

Bid.

3. Where a purchaser at a judicial sale raised his bid in open court, it was *held* that confirmation at the higher price was without prejudice to the former owner. *Id.*..... 719

Confirmation.

4. The rule that the appellate court will not disturb the finding of a trial court made upon conflicting testimony applies to orders confirming judicial sales. *Creighton University v. Riley*, 341
5. Record for review *held* not to disclose any irregularity which would have justified the trial court in setting aside a judicial sale. *Griffith v. Jenkins*..... 719

Description of Property.

6. Variance between the description in the decree and the description in the order, notice and report of judicial sale, *held* not ground for setting aside the sale. *Id.*..... 722

Replevin.

7. When property has been levied upon on writ of execution and has been delivered to a third person, plaintiff in a replevin suit against the officer making the levy, such property cannot be again seized by the officer under another writ against the same person while the replevin suit is pending. *Beagle v. Smith*..... 446

Executors and Administrators. See PARENT AND CHILD, 5. WILLS.

Under a will directing the sale of realty, the sale may be made by an administrator *cum testamento annexo*, the executor named having failed to qualify, and the will indicating no special confidence in him. *Koopman v. Carroll*..... 824

Experiments. See EVIDENCE, 3.

Expert Evidence. See EVIDENCE, 3.

Factors. See BROKERS.

False Representations. See INSURANCE, 21-25. SALES, 2, 3, 8-10.
• VENDOR AND VENDEE, 2.

Fees. See COSTS.

Fees and Salaries. See STATUTES, 5.

Fences.

Sec. 18, art. 2, ch. 2, Comp. Stats., defining a lawful fence, does not apply to a fence inclosing the right of way of a railroad company. *Chicago, B. & Q. R. Co. v. Lyon*..... 640

Final Orders. See REVIEW, 30-35.

Findings. See JUDGMENTS, 4. REPLEVIN, 1.

Fines. See SCHOOLS AND SCHOOL DISTRICTS, 1.

Foreign Laws. See CONFLICT OF LAWS, 2, 3. SALES, 2, 3.

Fraud. See CONTRACTS, 5. INSURANCE, 27. MORTGAGES, 5. SALES, 2-4, 8-10. STATUTE OF FRAUDS. VENDOR AND VENDEE, 2.

1. Where the only motive of a creditor is to secure a debt, he will not be held guilty of fraud because the effect of securing his debt is to leave the claims of other creditors unpaid. *Clarke Drug Co. v. Boardman*..... 687
2. Where an insolvent, by confession of judgment, makes a preference in favor of his mother who loaned him money, the burden is on her, in a contest with other creditors, to show by a preponderance of the evidence that the preference was accepted by her in good faith for her protection, and not for the purpose of defrauding any one. *Id.*

Fraudulent Conveyances. See SALES, 1.

Burden of Proof.

1. Where a transfer between relatives is attacked as fraudulent, the burden is upon the parties thereto to show the good-faith character of the transaction. *Nat. Bank of Commerce v. Chapman* 484

Chattel Mortgages. Registration.

2. Completed agreement not to file mortgage until financial difficulty of mortgagor made registration necessary to protect interests of mortgagee, the former to notify him of such difficulty, held to render the conveyance void as to mortgagor's creditors. *Ackerman v. Ackerman*..... 54
3. In a proceeding to avoid a sale of personalty as having been made in fraud of the rights of creditors of a firm, the fact that part of the consideration was the cancellation of a debt by one partner, incurred before the partnership was formed,

Fraudulent Conveyances—*concluded.*

and secured by an unrecorded chattel mortgage on the property before the firm became its owner, was not one which would have justified an instruction that the sale was void. *Wilson v. Gamble*..... 426

Preferences.

4. A son may convey property to his mother in payment of a pre-existing debt. *Nat. Bank of Commerce v. Chapman*..... 484
5. The rule that an insolvent debtor may prefer certain creditors to the exclusion of others applies to relatives of the debtor where they are creditors. *Id.*

Question of Fact.

6. Whether or not a conveyance by an insolvent corporation is fraudulent as to creditors cannot be determined as a question of law, but is a question of fact, to be determined from a consideration of the evidence in each particular case. *Shaw v. Robinson* 403
- Wallachs v. Robinson*..... 469

Trusts.

7. One taking title to realty of an insolvent firm for the purpose of selling the property and of paying part of the proceeds to a creditor of the firm and the balance to the firm, may be held liable to pay such balance to another creditor in a suit in equity brought by the latter against the firm and the trustee. *Raymond v. Leinberger*..... 815

Garnishment. See INTERPLEADER.

Gifts.

Evidence held to warrant the conclusion that the proceeds of notes payable to a daughter were not gifts to the father to whom payment was made. *Bell v. Rice*..... 547

Guaranty. See MORTGAGES, 1. PRINCIPAL AND AGENT, 3.

1. One who purchased stock in a corporation under a guaranty that it could be resold for \$3,000 within a year, held not required to submit to the guarantor for acceptance or rejection all offers received during that time. *Lobbeck v. Duke*..... 568
2. A guaranty by the seller of stock in a corporation that the purchaser could resell it for \$3,000 within a year, held to contemplate a resale for money, the guarantee not being required to make an effort to exchange the stock for other property. *Id.*
3. Where the seller of stock in a corporation guaranteed that it could be resold for \$3,000 within a year, whether the guarantee had been negligent in failing to make a resale, was held a question of fact for the jury. *Id.*
4. In an action on a guaranty that the purchaser of stock could resell it for \$3,000 within a year, it was held proper to refuse an instruction that a failure to make certain specified efforts to resell the stock constituted negligence. *Id.*

Guardian and Ward.

1. The provisions of sec. 64, ch. 23, Comp. Stats., apply to irregularities in respect to guardians' sales, and cannot operate to confer jurisdiction otherwise without existence. *Wells v. Steckleberg* 670
2. An order to sell land of a minor on application of one assuming to act as guardian, but who never qualified as such, and the sale pursuant to the order, *held* void. *Id.*

Habeas Corpus.

- One sentenced for the statutory offense of housebreaking under an information charging him with burglary may be discharged from custody. *In re McVey*..... 481

Harmless Error. See REVIEW, 46-48.

Highways.

Prescription.

1. To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land. *Engle v. Hunt*..... 358

User.

2. The existence of a highway over the premises of a private person may be shown by user alone, but the user must have been with the knowledge of the owner and have continued the length of time necessary to bar an action to recover the title to land, but this rule does not apply when the user is of wild, unenclosed prairie land. *Id.*

Improvements.

3. The acts of Douglas county in making an improvement extending across a highway, one-half of which was in the city of Omaha, *held* not *ultra vires*, though it was the duty of the city to improve the part of the street within its jurisdiction. *Douglas County v. Taylor*..... 536

Housebreaking. See BURGLARY, 2.

Husband and Wife.

Property Rights.

1. Prior to the taking effect of the married woman's act, June 1, 1871, the wife's chattels became those of the husband, and her choses in action became his when reduced to possession. *Eggleston v. Slusher*..... 83

Insurance. Creditors' Bill.

2. The proceeds of a fire insurance policy taken out by a husband on property bought in his name with his wife's money prior to June 1, 1871, *held* properly subjected to payment of claims of his creditors in a contest between them and the wife, to whom the husband had assigned the policy. *Id.*

Divorce. Attorneys' Fees.

3. Professional services of an attorney rendered to a wife in a

Husband and Wife—concluded.

suit for divorce are not "necessaries" for which the husband is liable in a separate suit brought against him by the wife's attorney after dismissal of the action for divorce. *Yeiser v. Lowe* 312

Pledges. Agency.

4. One taking from the husband as his pledge a note which had been assigned to the wife, *held* not justified in assuming that the husband was the wife's agent. *Norfolk Nat. Bank v. Newow* 429

Mortgages.

5. A loan to a husband is a sufficient consideration for a mortgage by his wife securing the loan. *Holmes v. Hull* 656
6. A married woman may, by a mortgage duly executed and delivered, bind her separate property for the payment of a loan to her husband, to the extent of the property covered by the mortgage. *Id.*

Improvements. See LANDLORD AND TENANT, 8, 9, 11.

Indictment and Information. See BURGLARY, 2. INTOXICATING LIQUORS, 2, 3.

Objections.

1. The remedy of the accused in an indictment or information is by plea, and not by motion to strike out unnecessary and immaterial allegations. *Blodgett v. State* 121
2. A motion or objection directed to an indictment or information as a whole will be overruled unless applicable to each count thereof. *Id.*

Validity.

3. The test by which to determine the sufficiency of an indictment is whether enough remains after rejecting all unnecessary averments thereof to satisfy the requirements of the statute. *Id.*

Joinder.

4. A charge of malpractice against an attorney and counselor at law may be joined with a prosecution for a contempt of court where both charges involve a single transaction. *Id.*

Election as to Counts.

5. Refusal, before trial, to require the state to elect as to which count it would rely upon, *held* reviewable without being assigned as error in the motion for a new trial. *Hans v. State*.. 150

Injunction. See JUDGMENTS, 6. RELIGIOUS SOCIETIES.

Garnishment.

1. Right of an insurance company which is a garnishee in possession of the proceeds of a policy, to an order enjoining the garnisher from prosecuting a *scire facias* against it after it had been sued in another court by an assignee of the beneficiary. *Hartford Life & Annuity Ins. Co. v. Cummings*..... 236

Obstruction of Alley.

2. Evidence, though conflicting, *held* sufficient to sustain a decree enjoining defendant from obstructing an alley. *Ryley v. Sandean* 111

Injunction—concluded.

Remedy.

3. As a preventive remedy *mandamus* cannot take the place of injunction. *State v. Piper*..... 25, 39

Taxes.

4. Injunction was denied in a suit to enjoin the collection of taxes, where plaintiff claimed that an error proceeding from an order of the board of equalization would be inadequate and failed to plead and prove the facts upon which his claim was based. *Webster v. City of Lincoln*..... 1

Trespass.

5. Evidence *held* sufficient to sustain a finding for plaintiff in an action to restrain defendant from using a portion of plaintiff's land for a highway. *Engle v. Hunt*..... 358

Insanity. See PARENT AND CHILD, 4.

Insolvency. See BANKS AND BANKING, 6-8. CORPORATIONS, 5, 6. FRAUDULENT CONVEYANCES, 1, 5-7.

- A druggist failed in business and confessed judgment on a note in favor of his mother who loaned him money to buy his drug store, and the preference was *held* not fraudulent as to other creditors who sold goods to the son. *Clarke Drug Co. v. Boardman* 687

Instructions. See ATTACHMENT, 6. MUNICIPAL CORPORATIONS, 6, 7. NEGLIGENCE, 4, 5. REVIEW, 3.

Criminal Law.

1. Where there may have been a possible state of facts which would warrant the refusal of an instruction omitted from the charge, an assignment of error assailing the ruling may be overruled in absence of a bill of exceptions. *Lauder v. State* 140
2. A charge which, construed as a whole, plainly states the law applicable to the case is without error. *Hans v. State*..... 151
3. Instruction *held* not to assume the possible existence of a single fact, but merely told the jury what were the material averments of the information. *Id.*
4. A material misstatement of the issues in an instruction in a criminal case is error which will not be cured by a correct statement in another instruction. *Raker v. State*..... 202
5. Argumentative instructions should not be given. *Id.*..... 208
6. An instruction in a criminal prosecution that if the jury should find the facts essential to establish guilt they should acquit, but if such facts had not been proven they should convict, is erroneous and ground for reversal, though it may be apparent to the appellate court that the trial court unintentionally transposed the words "convict" and "acquit." *Cummings v. State*..... 274

Evidence.

7. An instruction directing what weight should be given to certain facts, was properly refused. *Wilson v. Gamble*..... 426

Instructions—concluded.

8. An instruction unwarranted by the evidence, although an accurate statement of the law, is ground for reversal, provided it has a tendency to mislead the jury. *Fremont, E. & M. V. R. Co. v. Waters*..... 592
9. Instructions held applicable to the evidence in a suit by a broker for commissions on sale of realty. *Stewart v. Smith*.. 631
10. An instruction requiring defendant to establish a defense by a preponderance of evidence held erroneous. *Fremont, E. & M. V. R. Co. v. Harlin*..... 700

Exceptions.

11. An exception to all of the instructions is unavailing if any one of them is correct. *Id.*
12. Where several distinct requests to charge are denied, an exception to the refusal of all of them is insufficient, unless it appears that each should have been given. *Id.*

Repetitions.

13. An instruction like one already given may be refused. *Reuther v. Zimbleman* 165
City of South Omaha v. Powell..... 798
14. The court may refuse an instruction containing propositions already given to the jury. *Jamison v. Kent*..... 247
Behrends v. Beyschlag..... 305

Requests.

15. A party desiring an instruction more specific than those given should prepare one and present it. *Stewart v. Smith*.. 631

Insurance. See HUSBAND AND WIFE, 2. INTERPLEADER.

Additional Insurance.

1. Where an insurance company issues a policy with knowledge of other insurance on the same property, it cannot escape liability on the ground that no memorandum of the prior insurance was indorsed on the policy. *Home Fire Ins. Co. v. Wood*..... 381
2. A statement by the insured to the agent of the insurer that the former intends to procure additional insurance on the property is not notice of the existence of such additional insurance when obtained. *Id.*
3. Where insured violated a provision that the policy should be void if other insurance was subsequently obtained without the consent of the company, it was held that he could not recover on the first policy. *Id.*

Agents.

4. An agent who, upon learning that his agency is soon to be revoked, abuses his trust by wrongfully canceling policies of his principal and by transferring the risks to other companies, is liable to the company which issued the policies canceled for the premiums thereon. *Northern Assurance Co. v. Hamilton* 248

Insurance—continued.

5. A mere agreement of the soliciting agent to procure a policy does not create a present liability against the company.
Farmers & Merchants Ins. Co. v. Graham..... 818
6. Evidence *held* insufficient to show that an agent had authority to create a present liability binding upon his principal. *Id.*

Ambiguity. Parol Evidence.

7. Where, by omission in a written policy, the time when the instrument becomes operative is left in doubt, parol evidence is admissible for the purpose of supplying such omission.
Modern Woodmen Accident Ass'n v. Kline..... 345
8. *Held*, From the evidence, that the receipt of payment by insurer, subsequent to injury for which claim was made, applied to future indemnity only, and was not a waiver of payment in full as condition to the taking effect of the policy. *Id.*

Assessments.

9. The parties to an insurance contract may stipulate that it shall not become operative as an indemnity until payment is made in full by the insured of all charges and assessments required by the constitution, rules, and regulations of the insurer. *Id.*

Attorneys' Fees.

10. In an action on a policy, an indorsement on the summons that plaintiff will take judgment for attorneys' fees, *held* not a notice of the claim of plaintiff's attorney for a lien for fees, and service of the summons so indorsed did not convey to the company notice of such claim. *Cobbey v. Dorland*..... 373
11. Denial of application of plaintiff's attorney for leave to intervene and prosecute his claim against insurer for fees in an action on a policy, *held* proper, where plaintiff's case was settled and the action dismissed, without notice to insurer of a claim for an attorney's lien. *Id.*
12. Under sec. 45, ch. 43, Comp. Stats., the court may, in a suit on a policy covering both realty and personalty, allow a reasonable attorney's fee, based on the amount recovered on account of the realty. *Omaha Fire Ins. Co. v. Thompson*..... 581

Incumbrances.

13. Where one of the defenses to a suit on a policy was that insured incumbered the property in violation of a provision of the policy, it was *held* not error to exclude from evidence the record of a claim for a mechanic's lien. *Id.*..... 580
14. Existence of a chattel mortgage on a portion of the property at the time the risk was taken, *held* not to avoid the policy as being a breach of the provision relating to title. *Id.*
15. The voluntary execution by insured of a bill of sale of a portion of the property, without consideration, without delivery, without vendee's knowledge, without any prior contract, and without change in possession, does not create such a change in interest as to avoid the policy. *Id.*..... 581

Insurance—continued.

Mutual Benefit Insurance. Beneficiaries.

16. Where it is necessary to present a benefit certificate to the supreme secretary as a condition precedent to the right of the assured to designate his parents as beneficiaries, such presentation may be presumed from the designation actually made, accompanied by an intention to provide for the beneficiaries named and the subsequent payment by the assured during his lifetime of assessments for their benefit. *Shryock v. Shryock* 886
17. Change of beneficiaries under a certificate issued by a mutual benefit association held a sufficient compliance with the certificate and by-laws. *Id.*
18. Under a certificate issued by a mutual benefit association, the act of assured in directing payment to his father and mother held an original designation, and not a change of beneficiaries. *Id.*

Pleading.

19. Petition held not to state a cause of action for a loss. *Farmers & Merchants Ins. Co. v. Graham*..... 818

Reformation of Policy.

20. Evidence examined, and held insufficient to authorize the reformation of the policy in suit. *Home Fire Ins. Co. v. Wood*.. 381

Representations of Insured.

21. Evidence held sufficient to sustain a finding that there was no representation in a written application for insurance that the insured goods were in the building mentioned in the application at the time the application was made. *Omaha Fire Ins. Co. v. Crighton*..... 314
22. Where insured was illiterate and his statements to obtain insurance were reduced to writing by insurer's agent, whether the representations written in the policy were made by insured, was held a question of fact for the jury. *Id.*
23. An illiterate person whose statements to obtain insurance were reduced to writing by insurer's agent, held not bound by representations he did not make, though they were inserted in the written application. *Id.*
24. Evidence held sufficient to sustain a finding that insured did not represent his household goods were in the building mentioned in his application for insurance at the time the application was made. *Id.*
25. A trial court invaded the province of the jury in deciding the question whether the insurer issued the policy in reliance upon assured's false representations. *Kettenbach v. Omaha Life Ass'n*..... 846

Settlement.

26. Held, That the burden of establishing a settlement was on the insurer alleging it. *Omaha Fire Ins. Co. v. Thompson*.... 581
27. In a suit on a policy, agreement of insurer to pay a certain

Insurance—concluded.

sum in sixty days, acceptance of insured's orders, and admission of indebtedness as garnishee, the aggregate amount assumed being less than the amount of alleged settlement, *held* neither to operate as an accord and satisfaction, nor to estop insurer from rescinding the agreement for fraud. *Id.*

Interest. See USURY.

1. *Held*, On review, that a decree allowing interest pending appeal was warranted by a former judgment of the supreme court on a former appeal and by a stipulation of the parties made pending such former appeal. *Chappell v. Smith*..... 116
2. Where the proceeds of a note payable to a daughter were paid to her father, no demand upon him having been made for payment during his life-time, it was *held* that the daughter was only entitled to interest from the time she filed her claim against the father's estate. *Bell v. Rice*..... 547

Interpleader.

Where the proceeds of a life insurance policy were garnished in possession of an insurer subsequently sued in a different court by an assignee of the beneficiary, it was *held* that the company was entitled to an order requiring the garnisher to interplead in the action on the policy, and discharging the insurer from liability upon its paying the funds into court. *Hartford Life & Annuity Ins. Co. v. Cummings*..... 236

Intervention. See REVIEW, 34.

Denial of application of plaintiff's attorney for leave to intervene and prosecute his claim against defendant for fees, *held* proper, where plaintiff's case was settled and the action dismissed, without notice to defendant of a claim for an attorney's lien. *Cobbey v. Dorland*..... 373

Intoxicating Liquors.

1. Each act of keeping for the purpose of sale, without a license or permit issued by the proper body, any malt, spirituous, or vinous liquors, constitutes a misdemeanor. *Hans v. State*.... 151
2. Where an information contains two counts, each charging the keeping for sale, in violation of law, of a different kind of intoxicating liquors, and defendant is found guilty on both counts, a separate sentence is to be imposed for each conviction. *Id.*
3. A count charging the illegal sale of intoxicating liquors may be joined in an information containing a count charging the defendant with keeping such liquors for sale in violation of law. *Id.*
4. The unlawful intent with which intoxicating liquors are kept may be presumed by the recent prior sale by the defendant of the same kind of liquors, in violation of law. *Id.*
5. A contract for commission sales of intoxicating liquors by one as agent of another, neither of whom has been licensed, is void as against public policy. *Rocco v. Frapoli*..... 665

Issues. See REVIEW, 36-40.

Judgment. See EQUITY. INSOLVENCY. RES JUDICATA. REVIEW.
30-35, 49.

Default. Negligence.

1. The fact that default against a wife who was defendant in an ejectment suit resulted from negligence of her husband, will not justify a court of equity in setting aside the judgment. *Scott v. Wright*..... 849
2. Judgment permitted through negligence of counsel, *held* not the result of unavoidable casualty or misfortune. *Id.*

Estoppel.

3. A judgment in full force is binding upon the parties thereto, and their privies, as to the issues adjudicated. *Creighton v. Keith* 810

Findings.

4. A judgment that is not based on a finding, either general or special, is erroneous, though not for that reason void. *Maryott v. Gardner*..... 320

Injunction.

5. The rule whereby a party seeking affirmative aid of a court of equity to relieve him against a void judgment is required to disclose a meritorious defense to the cause of action does not apply in a case where the plaintiff is himself seeking affirmatively to enforce such judgment. *Campbell Printing Press & Mfg. Co. v. Marder*..... 283
6. In an action to enjoin the enforcement of a judgment, relief should not be granted because of the service of an unauthorized summons upon which such judgment was rendered, in the absence of a showing of the existence of a defense to the cause of action which formed the basis of the judgment assailed. *Fickes v. Vick*..... 401

Lien.

7. Land of J. T. Ward *held* not charged with the lien of a judgment erroneously entered against him as "S. T. Ward." *Autman v. Ward*..... 442
8. Plaintiff's release, from the lien of a judgment, of specific property owned by one of several of the judgment defendants, will not discharge the other defendants from liability. *Council Bluffs Savings Bank v. Griswold*..... 753
9. A judgment defendant cannot, as a matter of right, unaffected by equitable considerations, insist upon the preservation of the lien upon particular property of his co-defendants. *Id.*
10. Where, to an action upon a joint and several obligation, all parties liable are made defendants, the fact that the judgment rendered is void as to one, does not render it void as to all. *Id.*

Summons.

11. A defect in the manner of service of summons or in the form

Judgment—concluded.

of return will not subject a judgment to collateral attack.
Campbell Printing Press & Mfg. Co. v. Marder..... 283

12. Where attempted service of summons does not reach defendant, a judgment founded thereon is void. *Id.*

Judicial Sales. See EXECUTIONS. GUARDIAN AND WARD. LANDLORD AND TENANT, 10.

Jurisdiction. See ARBITRATION AND AWARD, 3, 4, 7. ATTACHMENT, 16. COUNTIES, 5. COURTS, 1. CRIMINAL LAW, 6. GUARDIAN AND WARD, 1. JUSTICE OF THE PEACE, 2.

Jury. See DAMAGES, 2. TRIAL, 2.

In an equity case the trial court may, in its discretion, impanel a jury and submit such issues of fact as it deems expedient.
Omaha Fire Ins. Co. v. Thompson..... 580

Justice of the Peace. See CONTINUANCE, 3. EVIDENCE, 5. REVIEW, 41, 55.

1. A hearing on motion to dissolve an attachment is a "trial" within the meaning of sec. 279 of the Code defining that term, and within the meaning of sec. 11, ch. 28, Comp. Stats., fixing the fees of justices of the peace. *Gibson v. Sidney*..... 12
2. A justice of the peace may acquire jurisdiction to render judgment for \$200 in a suit against a city for an injury sustained by plaintiff who fell into an unguarded excavation which was a nuisance within the meaning of sec. 621 of the Code. *City of Hastings v. Mills*..... 842

Laches. See BILL OF EXCEPTIONS, 1-4, 13. REVIEW, 42, 43. SALES, 8.

Landlord and Tenant.

Attornment.

1. Allegations by defendant that he was induced to enter into the lease by plaintiff's false representations of ownership, that plaintiff was not the owner of the premises, and that defendant accepted a lease from, and paid rent to, the true owner, *held* not to state a defense to an action for rent. *Nissen v. Turner*..... 272

2. A tenant who was not evicted, and who did not surrender his rights under the lease through which he obtained possession, cannot defend a suit by the lessor for rent on the ground that he attorned to another. *Mosher v. Cole*..... 636

Continuation of Tenancy.

3. Where a tenant with the consent of his landlord, express or implied, holds over his term, the law presumes a continuation of the original tenancy for another like term and upon the same conditions. *Bradley v. Slater*..... 682

4. The presumption that a hold-over tenant is bound for the second period upon the original terms, may be overthrown by evidence that he was to pay rent only for the time he occupied the premises. *Id.*

5. In a suit to recover from a hold-over tenant rent for the sec-

Landlord and Tenant—concluded.

ond term, evidence *held* insufficient to overthrow the presumption that he was bound for another period upon the original terms. *Id.*

6. Where a tenant does not vacate the premises when his lease expires, he may be treated by the landlord either as a tenant or as a trespasser. *Id.*

Destruction of Property. Rents.

7. The common law rule of construction of a covenant for payment of rent where a portion of the premises has been destroyed, *held* not in force. *Wattles v. South Omaha Ice & Coal Co.* 251
8. An express agreement of a lessee to keep in good repair the leased premises, and, at the end of the term, surrender their possession in as good condition as they were when he entered, natural decay, wear and tear excepted, is not, and does not include, a covenant to rebuild buildings destroyed without his fault. *Id.*
9. Where a substantial portion of leased premises is destroyed without the fault of the lessee, he is entitled to an apportionment of the rent covenanted to be paid and accruing thereafter, in the absence of an express assumption by him of the risk of such destruction. *Id.*

Partition of Premises.

10. Where realty owned by two persons has been leased for a term of years and partition has been decreed on petition of one of them, the lessee will become a tenant of the purchaser at the judicial sale. *Oliver v. Lansing*..... 828

Repairs.

11. Claims for repairs ordered by lessee before appointment of a receiver, *held* not charges against either the property or rent money in hands of the receiver, but individual debts of the lessee. *Estabrook v. Stevenson*..... 378

Larceny.

Evidence *held* sufficient to sustain a verdict of guilty in a case where accused was charged with the larceny of cattle. *Fanton v. State*..... 352

Lease. See LANDLORD AND TENANT.

Legislative Appropriations. See STATE, 1-4.

Levy. See ATTACHMENT, 1.

Libel and Slander.

1. A false or malicious publication, in print or writing, which tends to injure the reputation of another person, or to bring him into contempt, hatred, or ridicule, is libelous, and the publisher is amenable to the criminal law. *Raker v. State*.. 202
2. In a prosecution for criminal libel it is error to so instruct the jury as to cast upon the defendant the burden of establishing that the alleged publication was not libelous. *Id.*

Liens. See ATTORNEYS' LIENS. CHATTEL MORTGAGES. JUDGMENTS. MECHANICS' LIENS. MORTGAGES.

Life Insurance. See INSURANCE, 16-18.

Limitation of Actions. See HIGHWAYS, 1, 2. PARTNERSHIP, 2. SALES 3. USURY, 4.

1. Where a tax lien exists at the time a deed containing a covenant against incumbrance is executed, a cause of action immediately accrues in favor of the covenantee, which will be barred by limitation in five years. *Bellamy v. Chambers*..... 146
2. The defense of the statute of limitations cannot be invoked for the first time in the supreme court. *Bell v. Rice*..... 547
3. A cause of action against a railroad company for damages resulting from the negligent construction of ditches, arises when the injury occurs, and not when the ditches are completed. *Fremont, E. & M. V. R. Co. v. Harlin*..... 700

Lost Instruments. See WILLS, 1-3.

Majority. See MUNICIPAL CORPORATIONS, 12.

Malpractice.

- A charge of malpractice against an attorney may be joined with a prosecution for a contempt of court where both charges involve a single transaction. *Blodgett v. State*..... 121

Mandamus.

Nature of Writ.

1. *Mandamus* can only be invoked to compel the performance of some particular act which the law especially enjoins as a duty resulting from an office, trust, or station. *State v. Piper* 25, 39
2. As a preventive remedy *mandamus* cannot take the place of injunction. *Id.*
3. *Mandamus* can only be resorted to for the purpose of compelling action, and is not a proceeding to correct errors. *Id.*

Pleading.

4. The facts recited in an alternative writ must be sufficient to entitle relator to the issuance of a peremptory writ. *King v. State* 66
5. On demurrer to recitals in the alternative writ, the recitals must all be considered, and the refusal of compliance upon certain grounds by respondent will be held to excuse technical exactness in stating why, on other grounds, relator is entitled to the relief sought. *Id.*
6. A writ of *mandamus* will only be allowed when the relator clearly establishes his right. *State v. Bartley*..... 874
7. Nothing essential to plaintiff's right to the writ will be taken by intendment. *Id.*

Auditor of State.

8. Writ allowed against the auditor of public accounts to com-

Mandamus—concluded.

- pel him to issue a warrant for the salary of a court stenographer. *State v. Cornell*..... 526
- District Judge.*
9. Writ denied on application to compel a district judge to recall an order of sale issued upon a decree of foreclosure, no proper supersedeas having been filed. *State v. Ramsey*..... 166
- Secretary of State.*
10. Upon facts stated the writ was denied on application to compel the secretary of state to certify to the county clerks the names of certain persons as republican nominees for offices. *State v. Piper*..... 42
- State Printing Board.*
11. A bidder for state printing cannot obtain a writ to compel the state printing board to award him the contract where he fails to show that his bid was accompanied by the bond required by statute. *State v. Bartley*..... 874

Married Women. See HUSBAND AND WIFE.**Master and Servant.***Vice-Principal.*

1. The most satisfactory evidence that one is a vice-principal is that his co-employees are under his supervision and control and subject to his orders. *Union P. R. Co. v. Doyle*..... 556
2. The fact that an employe is vested with authority to hire and discharge a co-employe is not conclusive evidence that as to such co-employe he is a vice-principal. *Id.*
3. Whether one of several employes of the same master is a vice-principal as to the co-employees, is generally a mixed question of law and fact to be determined by the facts and circumstances in the case in which it is presented. *Id.*
4. A section-hand who was injured while working with the section-boss, section-crew, and others on a gravel train, *held* not a fellow-servant of the foreman of the train, but a vice-principal. *Id.*..... 555

Negligence.

5. Evidence *held* to sustain a finding that the negligence of a servant was not the proximate cause of his injury. *Id.*..... 556
6. Evidence *held* not to sustain a finding that the negligence of a railway company was the proximate cause of a servant's injury. *Id.*
7. A verdict for negligence must have the support of competent positive evidence that the injury complained of was caused by the negligence of the master, or such negligence must be inferable from proved or conceded facts. *Chicago, B. & Q. R. Co. v. Soderberg*..... 674

Risks of Employment.

8. A servant by his contract of employment assumes the ordinary risks incident thereto. *Id.*

Mechanics' Liens. See SUBROGATION, 3.

1. The sworn statement of a subcontractor for a mechanic's lien must contain a description of the premises on which the improvement was erected. *Drexel v. Richards*..... 509
2. A description of the premises in the sworn statement of a subcontractor for a mechanic's lien is not insufficient where it renders the location susceptible of ready ascertainment by the aid of extrinsic evidence. *Id.*
3. A description of property in a statement for a mechanic's lien as the "Bartlett & Downing Block, Kearney, Buffalo county, Neb.," is a sufficient description of the premises, especially when there are no rights of third parties to be affected by the lien. *Id.*
4. The account of the items for the materials furnished and labor performed by a contractor or subcontractor, and for which a lien is claimed, and the affidavit thereto attached should be construed together, and if, when thus construed, they substantially comply with the statute it is sufficient. *Id.*
5. The filing of a claim for a mechanic's lien does not in itself establish such a lien. *Omaha Fire Ins. Co. v. Thompson*..... 580

Mistake. See ARBITRATION AND AWARD, 8. MORTGAGES, 7-9. SUBROGATION, 3.

To justify the reformation of a written contract for mistake, the mistake must be mutual and be established by clear, convincing, and satisfactory evidence. *Home Fire Ins. Co. v. Wood*.. 381

Mortgages. See EXECUTIONS, 1. HUSBAND AND WIFE, 5, 6. MANDAMUS, 9. NEGOTIABLE INSTRUMENTS, 9. SUBROGATION, 1-3.

Consideration.

1. A mortgage given to secure the guarantor of mortgagor's note held not void for want of consideration. *Steen v. Stretch*, 573

Execution.

2. A mortgage duly witnessed and acknowledged is of itself *prima facie* evidence that the mortgagor signed it. *Greeley State Bank v. Line*..... 434
3. A mortgage upon realty, other than a homestead, executed and delivered by mortgagor is valid between the parties and those having knowledge of its existence, though not lawfully acknowledged or witnessed. *Holmes v. Hull*..... 656

Assignment.

4. An equitable assignment of a note and mortgage may be made by sale and delivery without indorsement or written assignment, and the purchaser may maintain an action in his own name to foreclose the mortgage. *Greeley State Bank v. Line* 434

Fraudulent Release.

5. A fraudulent release by mortgagee after indorsement without recourse of the note, in favor of a third party baving

Mortgages—concluded.

notice of the rights of the holder, does not of itself render the mortgagee liable in a suit *ex contractu* for the amount of the debt. *Smith v. Long*..... 749

Notice.

6. A subsequent incumbrancer *held* charged with notice by the record of a prior mortgage which did not truly state its conditions. *Steen v. Stretch*..... 573

Description.

7. A mortgage will not be invalidated by reason of an error in the description of the realty, where the remainder of the description is sufficiently definite to enable one to locate the land. *Carpenter Paper Co. v. Wilcox*..... 659

Reformation.

8. A mutual mistake in describing the property will justify reformation of the mortgage, not only as against mortgagor, but as against purchasers chargeable with notice of the mistake. *Id.*
9. Evidence *held* sufficient to justify the reformation of a mortgage on the ground of a mutual mistake in describing the property intended to be incumbered. *Id.*

Payment and Satisfaction.

10. Answer in a suit to foreclose a mortgage *held* to charge satisfaction of the debt. *Roberts v. Samson*..... 746
11. Facts stated in opinion *held* not to sustain the plea of payment. *Moore v. Pollock*..... 901

Municipal Corporations. See COSTS, 3. SCHOOLS AND SCHOOL DISTRICTS, 1. TAXATION, 1.*Dangerous Premises.*

1. In a suit against a city for damages sustained by a plaintiff who fell into an unguarded excavation in a lot abutting on a street, a correct plan or drawing of the excavation and surroundings, *held* competent evidence. *Village of Culbertson v. Holliday* 229
2. A city *held* liable for the death of a child who fell from a piece of sidewalk while using it as a raft upon a pond situate partly in the street and partly upon private property, the accumulation of water being occasioned by the negligence of the city in grading the street and in constructing a sewer. *City of Omaha v. Richards*..... 804

Streets and Sidewalks.

3. A city is required to exercise reasonable care and diligence in keeping a street in a safe condition for travel, though the street may not be frequently used by the public. *City of South Omaha v. Powell*..... 798
4. Where a municipality improves any portion of a street for the purpose, and with the result, of inducing public travel thereon, there is a resulting duty to keep such portion of the

Municipal Corporations—concluded.

- street in repair, and a consequent liability for the failure to do so. *City of Ord v. Nush*..... 335
5. The term "sidewalk" denotes that portion of the public highway set apart, by dedication, ordinance, or otherwise, for the use of persons traveling on foot. *Id.*
6. It is not error to charge that a city is required to keep its streets and sidewalks in a reasonably safe condition for travel, by night as well as by day. *Id.*
7. An instruction that it is the duty of a city to keep its streets in a reasonably safe condition for travel by all persons is not objectionable on the ground that it excludes from the jury the question of alleged contributory negligence by the plaintiff. *Id.*
8. Instructions held to correctly state the rule as to liability of a city for failure to keep its streets in safe condition for the use of the public. *City of Omaha v. Richards*..... 804
- Title to Streets.*
9. Under sec. 106, art. 1, ch. 14, Comp. Stats., the acknowledgment and registration of a plat subdividing tracts of land are equivalent to a deed in fee-simple of such portion of the premises platted as is on such plat set apart for streets and other public uses. *Ehmen v. Village of Gothenburg*..... 715

Parks.

10. The word "park" means a tract of land within or near a town or city devoted to purposes of amusement, pleasure, or exercise, and the word generally means a park open to the public. *Id.*

Funding Bonds. Elections.

11. The clause, "When the same shall have been authorized by a vote of the people," employed in sub. 21, sec. 67, art. 1, ch. 13a, Comp. Stats., relating to authority to issue municipal bonds, means authorized by a majority of the voters of the city. *Bryan v. City of Lincoln*..... 620
12. Under sub. 21, sec. 67, art. 1, ch. 13a, Comp. Stats., a proposition to authorize the issuance of funding bonds submitted at a general city election cannot be adopted unless it receives a majority of all the votes cast at such city election. *Id.*

Water Rent.

13. By sub. 15, sec. 69, ch. 14, Comp. Stats., 1887, the city of North Platte was authorized to contract with a corporation to erect and maintain a system of water-works, to supply the city with water, and to levy a water tax. *North Platte Water-Works Co. v. City of North Platte*..... 853
14. In a suit against a city to recover water rents, it was held unnecessary for plaintiff to plead the statute authorizing the city to enter into the contract under which the water was supplied. *Id.*

Mutual Benefit Insurance. See INSURANCE, 16-18.

Negligence. See **BANKS AND BANKING**, 1. **BATHING RESORTS. JUDGMENTS**, 1, 2. **MASTER AND SERVANT**, 5-7. **MUNICIPAL CORPORATIONS**, 7. **PLEADING**, 2. **STREET RAILWAYS. WATERS**, 9.

Contributory Negligence.

1. If a person, in the exercise of ordinary care, is injured through the negligence of another, he may recover; but if his own negligence contributed to or was the proximate cause of the injury he cannot recover. *Village of Culbertson v. Holliday* 229

Degrees of Negligence.

2. The doctrine of comparative negligence is not in force. *Id.*
3. In an action for damages for injuries alleged to have been sustained through the negligence of another, there is no such issue as the slight negligence of any one. *Id.*
4. Such expressions as "slight negligence" and "slight want of ordinary care" should not be used in instructions. *Id.*

Evidence.

5. It is error for a court to state to a jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that they amount to negligence. *Id.*
6. Whether a certain act or omission is or is not evidence of negligence is for the court, but whether such evidence convicts a party of negligence is for the jury. *Id.*
7. Where only one conclusion can be drawn from the undisputed facts, the court may direct a verdict consistent therewith. *Knapp v. Jones* 490
8. Evidence held insufficient to sustain a judgment against a railroad company in a suit by a section-hand who was injured by a passing locomotive. *Chicago, B. & Q. R. Co. v. Soderberg*, 674

Ordinary Care.

9. The law requires of a person the exercise of care and caution commensurate with the danger confronted, but this rule involves no more than the exercise of ordinary care and prudence in view of the circumstances. *Village of Culbertson v. Holliday* 229
10. The law does not require of an old person the exercise of greater care to avoid injury than it requires of a young and vigorous one. *Id.*
11. In avoiding injury the law does not require the exercise of extraordinary care. *Id.*
12. In an action for damages resulting from defendant's alleged negligence, plaintiff cannot recover where it appears that his failure to exercise ordinary care was the cause of the injury. *Knapp v. Jones* 490

Negotiable Instruments. See **ALTERATION OF INSTRUMENTS. BANKS AND BANKING**, 2-5. **CHECKS. MORTGAGES**, 4. **PLEDGES.**

Execution Sales.

1. The purchaser of a note at execution sale acquires only the defendant's interest. *Jones v. Wiesen* 244

Negotiable Instruments—concluded.

2. The purchaser of a note at execution sale occupies the same relation to the maker as he would have occupied had the note been indorsed to him without recourse by the payee. *Id.*
Indorsements. Rights of Transferees.
3. Where the payee of a negotiable note indorses and delivers it to his creditor to secure the payment of a debt owing to latter, the creditor becomes an innocent holder of the note and acquires a lien thereon for the amount of his debt, provided he took it before maturity, without notice of any defenses thereto. *Id.*..... 243
4. One who purchases for value a negotiable note, either before or after its maturity, with knowledge of a defense thereto, is entitled to enforce the collection of the entire note, provided his assignor was an innocent purchaser, before due, for value, in the usual course of business. *Id.*..... 244
5. Where a creditor of payee became an innocent holder of a note through an indorsement to secure the debt, a second creditor who paid the claim of the first creditor and took from him an assignment of the note, acquired the same lien and title possessed by the assignor, though the assignee knew that defenses existed against the note. *Id.*
6. In a suit by an indorsee of a note against the maker, held that the answer fails to state a defense. *First Nat. Bank of Dubuque v. McKibben*..... 513
7. In a suit by an indorsee of a note against the maker, its production by plaintiff, duly indorsed, raises a presumption that it was transferred before maturity for value, and the burden is on defendant to show that plaintiff is not an innocent holder. *Id.*
8. In a suit by an indorsee of a note against the maker, evidence held insufficient to sustain a verdict for defendant. *Id.*
9. Where a note provides it is governed by the conditions of a mortgage reciting that no general execution shall issue against the makers or indorsers of the note, but that mortgagee shall take the premises in full satisfaction of the debt, the makers and indorsers of the note are exempt from personal liability, and the remedy of the holder of the mortgage is restricted. *Sciencoe v. First Nat. Bank of Kearney*..... 612
Parol Evidence.
10. In a suit on a note a contemporaneous contract in writing connected with the note by direct reference or by necessary implication, held admissible in evidence. *Id.*
11. A general indorsement of commercial paper may, except as against a *bona fide* holder, be explained and the precise terms of the agreement shown by parol evidence. *Whitney v. Spearman* 617

New Trial. See CRIMINAL LAW, 1. REVIEW, 44. SET-OFF AND COUNTER-CLAIM. TRIAL, 3, 4.

1. A judge may pass on a motion for a new trial in a case tried

New Trial—concluded.

before the judge of another district, where the latter ceased to preside before the hearing of the motion. *Lauder v. State*, 140

2. An assignment in a motion for a new trial that a group of instructions is erroneous is insufficient if any one of them was properly given. *City of South Omaha v. Powell*..... 798

Nominations. See ELECTIONS, 1-4.

Nonsuit. See DISMISSAL.

Notice. See MORTGAGES, 6. PLEDGES. SUMMONS.

Novation.

There can be no novation of a debt in the absence of an unqualified discharge of the original debtor by the creditor. *Western White Bronze Co. v. Portrey*..... 801

Nuisance. See JUSTICE OF THE PEACE, 2.

Office and Officers. See COUNTY TREASURERS. ELECTIONS, 1-4. STATE.

Parent and Child.

1. Generally, where a child renders services for a parent, the law presumes the services were gratuitously rendered. *Bell v. Rice* 547
2. Whether the evidence warrants the conclusion that a parent promised to pay for services rendered by a child is a question for the jury. *Id.*
3. A child may recover the value of services rendered for a parent where the evidence shows that the services were rendered under circumstances justifying the inference of a contract on part of the parent to make payment. *Id.*
4. Services rendered by a stepdaughter in caring for her imbecile stepfather, *held* necessities for which his estate is liable. *Id.*
5. Where the proceeds of a note payable to a daughter were paid to her father, the latter's estate was *held* liable for the sum received by him, with interest from the date of filing the claim. *Id.*

Parks. See DEDICATION.

Parties. See BANKS AND BANKING, 6. JUDGMENTS, 10. MORTGAGES, 4. PARTNERSHIP, 1-4.

Partition.

1. In a cause within the law authorizing a partition, the right of plaintiff to a decree is imperative and absolutely binding upon courts of equity. *Oliver v. Lansing*..... 828
2. The fact that inconvenience in making distribution, or probable loss, is involved, does not affect the absolute right to have partition decreed. *Id.*

Partnership. See FRAUDULENT CONVEYANCES, 3.

1. The description of the individual members of a defendant

Partnership—concluded.

partnership firm does not make such individuals defendants, the reference to them being merely *descriptio personæ*. *Winters v. Means*..... 209

2. In a suit under sec. 27 of the Code to charge the property of an individual member of a firm with the payment of a judgment against it, an entry of appearance by the firm, and failure to interpose the statute of limitations as a defense, conclude the individual as to the binding force of such judgment with respect to the objection indicated. *Id.*
3. One who shared in the profits of a venture as compensation for services *held* not a partner, where he had no interest in or control over the property involved except as a salesman. *Whitney v. Gretna State Bank*..... 438
4. *Held*, That an action was not one brought under sec. 24 of the Code authorizing partnerships to sue without setting forth the names of the partners, that it did not abate on the death of a partner, and that it could properly be continued in the name of the survivor alone. *Union P. R. Co. v. Metcalf*..... 452

Payment. See INSURANCE, 8. PRINCIPAL AND AGENT, 5. SALES, 6, 7.

Sufficiency of allegation of payment in a suit to foreclose a mortgage. *Roberts v. Samson*..... 745

Personal Injuries. See NEGLIGENCE.

Physicians and Surgeons. See DAMAGES, 5, 6.

Pleading. See ASSAULT AND BATTERY, 2, 3. BANKS AND BANKING, 8. CARRIERS, 1. JUDGMENTS, 5. LANDLORD AND TENANT, 1. MANDAMUS, 4, 5. REPLEVIN, 4. RES JUDICATA. SET-OFF AND COUNTER-CLAIM. TAXATION, 1. TROVER AND CONVERSION.

Petition.

1. Petition *held* to state a cause of action in a suit by a teacher against a school district for breach of contract of employment. *Wallace v. School District*..... 171
2. A petition charging a railroad company with carelessly and negligently constructing a ditch, *held* good as against a general demurrer, though subject to attack by motion to make it more definite and certain. *Fremont, E. & M. V. R. Co. v. Harlin* 698
3. Facts averred in a petition *held* insufficient to authorize the court, in the exercise of equity jurisdiction, to set aside a judgment by default in an ejectment suit. *Scott v. Wright*.... 852
4. Petition *held* to state a cause of action against a city for water rents. *North Platte Water-Works Co. v. City of North Platte* 853

Answer.

5. *Held*, That one answering to the merits of an amended petition and participating in the trial, waived the right to complain

Pleading—concluded.

- that a new cause of action was stated in the amended petition. *Grotte v. Nagle*..... 363
6. Answering over after the overruling of a general demurrer to the petition is not a waiver of the defect that the petition fails to state a cause of action. *Hopewell v. McGrew*..... 789
7. Averments of an answer attacked by general demurrer held sufficient to show the existence and probate of a will through which defendant claimed title. *Koopman v. Carroll*..... 824
- Demurrer.*
8. Averments of legal conclusions in a pleading are not admitted by a demurrer. *State v. Ramsey*..... 167
9. A general demurrer will not lie to a pleading sufficient in substance but wanting in form or completeness. *Roberts v. Samson* 745
10. A pleading assailed by general demurrer will be held to charge what can be implied from the statements therein by reasonable and fair intendment. *Id.*

Reply.

11. In a suit in the nature of trover against a sheriff, it was held proper for plaintiff to plead in his reply that the property seized by the defendant was already in *custodia legis*. *Beagle v. Smith* 446

Amendments.

12. An order overruling a motion to strike an amended petition from the files, held equivalent to leave to file the amended petition. *Grotte v. Nagle*..... 363
13. An amendment of a pleading to conform to the proof held proper. *Id.*..... 364

Pledges. See NEGOTIABLE INSTRUMENTS, 5.

Where a wife to whom a note had been assigned delivered it to her husband to be deposited in bank for collection, the husband borrowing money from the bank and pledging the note as security, it was held that the assignment was sufficient to put the bank on inquiry as to the husband's title to the note. *Norfolk Nat. Bank v. Xenow*..... 429

Practice. See CONFLICT OF LAWS, 3. DISMISSAL.**Preferences.** See CORPORATIONS, 4-6. FRAUD, 2.**Prescription.** See HIGHWAYS, 1, 2.**Principal and Agent.** See BANKS AND BANKING, 5. BROKERS. CONTRACTS, 4, 6. INSURANCE, 5.*Agent's Abuse of Trust.*

1. An agent who, upon learning that his agency is soon to be revoked, abuses his trust by wrongfully canceling policies of his principal and by transferring the risks to other companies, is liable to the company which issued the policies canceled for the premiums thereon. *Northern Assurance Co. v. Hamilton* 248

Principal and Agent—concluded.

Authority of Agent.

2. A husband may act as the agent of his wife, but in order to bind her he must previously be authorized, or she must, with a knowledge of his acts, subsequently ratify them. *Norfolk Nat. Bank v. Nenow*..... 429
3. Evidence held sufficient to show that a contract pledging defendant's credit was within the scope of the authority of the agent by whom it was executed. *Oberne v. Burke*..... 764
4. A collecting agent cannot extinguish a debt due his principal, by setting off against it his own debt, unless authorized to do so by his principal. *Western White Bronze Co. v. Portrey*.. 801
5. An agent employed to make collection of commercial paper is, as the result of that relation, authorized to receive in payment such coin or currency only as is by law declared to be a legal tender, or which is by common consent treated as money. *Moore v. Pollock*..... 900

Ratification.

6. Evidence held sufficient to warrant a jury in finding that defendant ratified a contract made by an agent. *Oberne v. Burke* 764
7. A ratification by a principal of the unauthorized act of his agent may be inferred from the conduct of the former inconsistent with any intention other than a purpose to adopt such act as his own. *Id.*

Principal and Surety. See ALTERATION OF INSTRUMENTS, 1. ATTACHMENT, 4.

The liability of a surety is measured by, and will not be extended beyond, the strict terms of his contract. *Hopewell v. McGrew* 789

Printing. See STATE, 5.

Privileged Communications. See EVIDENCE, 10-12.

Process. See SUMMONS.

Public Policy. See CONTRACTS, 6-8.

Questions for Jury. See INSURANCE, 22, 25. NEGLIGENCE, 6. PARENT AND CHILD, 2. WATERS, 4.

Questions of Fact. See CONTRACTS, 2.

Railroad Companies. See CARRIERS. DAMAGES, 3. MASTER AND SERVANT, 1-6. STREET RAILWAYS.

1. An order of the state board of transportation requiring a railroad company to surrender a portion of its right of way to one buying and shipping grain, for an elevator site, is unconstitutional and void. *Chicago, B. & Q. R. Co. v. State*... 339
2. One who builds a fence between his land and the right of way of a railroad company upon its failure to do so after notice, can recover the expense incurred only by showing that the fence complies with the requirements of sec. 1, art. 1, ch. 72, Comp. Stats. *Chicago, B. & Q. R. Co. v. Lyon*..... 640

Real Estate. See MORTGAGES. VENDOR AND VENDEE.

Real Estate Agents. See BROKERS.

Receivers. See BANKS AND BANKING, 6, 7, 11-13. LANDLORD AND TENANT, 11.

Where a receiver, without authority, advertises and sells assets after the date fixed by the decree, the sale is void and cannot be rendered valid by confirmation over objections. *Ackerman v. Ackerman* 55

Reference.

The action of the trial court in returning the case to the referee for further finding in respect to an item as to which the petition was allowed to be amended to conform to the proof, and the reception of a supplemental report containing such finding, and its consideration in the final settlement of the issues, approved. *Grotte v. Nagle* 365

Reformation of Instruments. See MISTAKE. MORTGAGES, 7-9.

Registration. See MUNICIPAL CORPORATIONS, 9.

Relatives. See FRAUDULENT CONVEYANCES, 1, 4, 5.

Release. See EMINENT DOMAIN, 2. JUDGMENT, 9. MORTGAGES, 5.

Religious Societies.

Where the right of a faction of a church to control its property or records is mainly dependent upon matters of religious doctrine, as to which the disputing factions entertain diverse views, civil courts should decline to interfere. *Moseman v. Heitshusen* 420

Rents. See LANDLORD AND TENANT, 2, 8, 9. VENDOR AND VENDEE, 8.

Replevin. See EXECUTIONS, 7.

Damages.

1. Where the property has been returned to defendant for failure of plaintiff to give the statutory undertaking, and the action proceeds as one for conversion, the measure of his damages, in case the right of property and of possession is found in his favor, is the market value of the property, with interest. *Baum v. Union Savings Bank* 387
Ownership. Pleading.
2. Where plaintiff bases his right to the possession of property upon a special ownership he must in his petition plead the facts which create such special ownership. *Griffing v. Curtis*, 334
3. Plaintiff's allegation of general ownership and right of possession cannot be proved by introducing in evidence a mortgage on the chattels replevied. *Robinson v. Kilpatrick* 795
4. A plaintiff who claims a special ownership by virtue of a chattel mortgage must allege facts showing his interest in the property and his right to possession. *Norcross v. Baldwin* 885

Replevin—concluded.

Suit on Bond.

5. Delivery of the specific property affected by the judgment in a replevin case amounts to a satisfaction of the judgment, except unpaid costs and damages; and thereafter liability on the replevin bond is limited to unpaid costs and damages. *Otto v. Burch*..... 894
6. Where a defendant who has successfully defended an action of replevin obtains possession of the property by a second suit, instead of resorting to the bond given for his protection, he thereby waives right to the alternative relief of recovery of the value thereof. *Id.*

Rescission. See SALES, 8-10.

Res Judicata. See COUNTIES, 4. PARTNERSHIP, 2.

Where defendant pleads fraud and breach of warranty in a suit on the first of a series of notes given for the same consideration, a judgment for plaintiff may be pleaded as a bar to the same defense in an action on the second note of the series. *Gilmore v. Whiteman*..... 760

Review. See BILL OF EXCEPTIONS. COUNTIES, 4. CRIMINAL LAW, 1. INSTRUCTIONS. INTEREST, 1. TRIAL, 9, 10.

Abstracts.

1. In a case submitted on an agreed printed abstract, the court will not look beyond the abstract, and unless error affirmatively appears therefrom the judgment below will be affirmed. *Closson v. Rohman*..... 323
2. In a case submitted on an abstract the court will not examine the transcript. *North Platte Water-Works Co. v. City of North Platte*..... 853

Assignments of Error.

3. An assignment of error relating to a group of instructions, where the ruling as to any one of the group against which the assignment is directed is without error, may be overruled. *Behrends v. Beyschlag*..... 304
Town v. Missouri P. R. Co...... 769
4. The question as to whether there was error in the assessment of the amount of recovery will not be considered unless raised by a proper assignment of error. *Montgomery v. Albion Nat. Bank* 652
5. In an error proceeding, a point not presented by an assignment of error will be disregarded, though argued in briefs of counsel. *Clarke v. Nebraska Savings & Exchange Bank*..... 669
6. Under an assignment of error that the damages awarded are excessive, the supreme court will not review the action of the trial court in admitting in evidence items of damage. *Roberts v. Hopper* 681
7. A party may be permitted to amend his petition in error to cover a point presented below. *Robinson v. Kilpatrick*..... 795

Review—continued.

8. Assignments of error requiring an examination of evidence may be overruled in absence of a bill of exceptions. *Chicago Lumber Co. v. Benjamin*..... 143
Bill of Exceptions.
9. A bill of exceptions not authenticated according to statute will be disregarded upon review. *Royse v. State Nat. Bank of St. Joseph* 16
10. An unauthenticated bill of exceptions will be disregarded in the supreme court. *Chicago Lumber Co. v. Benjamin*..... 143
11. A bill of exceptions will be disregarded upon review unless certified by the clerk of the trial court to be the original or a true copy. *Reuther v. Zimbleman*..... 165
12. A bill of exceptions not authenticated by the clerk of the district court will be disregarded. *Talcott v. Field*..... 635
13. A bill of exceptions may be considered upon satisfactory proof of its proper authentication, though the authentication has been lost. *Winters v. Means*..... 209
14. A decree supported by the pleadings may be affirmed upon appeal where the clerk below failed to authenticate the bill of exceptions. *Berger v. Lincoln County*..... 687
15. Where affidavits for a continuance are to be considered upon review, they must be embodied in a bill of exceptions. *Hans v. State* 150
16. Where the bill of exceptions reveals that material evidence introduced on the trial has been omitted, the court cannot review an order denying a motion to direct a verdict, when to do so would require an examination of the proofs. *Id.*..... 151
17. Assignments of error involving an examination of the evidence will be disregarded where the bill of exceptions has been quashed. *Reynolds v. McCandless*..... 225
18. Questions of fact cannot be considered where the record presents no proper evidence that the alleged facts existed. *Iowa Loan & Trust Co. v. Walker*..... 667
19. In absence of a bill of exceptions issues of fact cannot be considered in the appellate court, though the transcript recites that it contains the agreed statement of facts upon which the cause was determined. *Stuart v. Burcham*..... 823
20. One desiring to obtain a review of a ruling upon a question of fact should preserve the evidence by means of a bill of exceptions, allowed in the manner provided by law. *Douglas v. Smith* 899

Briefs.

21. A question discussed in the briefs but not raised by an assignment of error will be disregarded. *Raker v. State*..... 202

Evidence.

22. The judgment should not be disturbed where the only question presented is one of fact as to which the evidence is conflicting. *Shafer v. Hostetter*..... 71

Review—continued.

23. Evidence, though conflicting, held sufficient to sustain a decree enjoining defendant from obstructing an alley. *Ry'cy v. Sandean* 111
24. Questions of fact determined upon conflicting evidence will not be reviewed in the supreme court. *Montgomery v. Albion Nat. Bank* 652
25. A judgment supported by sufficient evidence will be affirmed, where no question of law is presented. *Emerson v. Kilroy*.... 591
26. A finding on conflicting evidence will not be disturbed unless manifestly wrong. *Woods v. Hart*..... 497
27. A reversal will not be entered for insufficiency of evidence unless the judgment is manifestly wrong. *Stewart v. Smith*.. 631
28. The record must show an abuse of discretion on part of the trial court in order to authorize the reversal of a judgment on account of the admission of evidence of experiments introduced for the purpose of contradicting or corroborating witnesses. *City of Ord v. Nash*..... 336
29. It is not reversible error for a court to reject an offer of competent and relevant evidence if the evidence rejected, when considered with all other evidence bearing on the issue to which it was directed, would not support the conclusion sought to be established by the rejected evidence. *Whitney v. Gretna State Bank*..... 438

Final Orders.

30. An order of the board of equalization relating to assessment of taxes is a final order, and an error proceeding may be prosecuted therefrom. *Webster v. City of Lincoln*..... 1
31. Unless provided by law, appeal will not lie from a decision of the board of equalization. *Id.*
32. An appeal or proceeding in error will not lie directly to the supreme court to review the decisions of the secretary of state under the Australian ballot law. *State v. Piper*.....25, 39
33. A finding without a judgment in a summary prosecution for contempt of court will not be reviewed by means of proceedings in error. *Blodgett v. State*..... 121
34. An order striking a petition of intervention from the record, on the ground that it was not filed within the time allowed, is not such a final order as will be reviewed upon petition in error. *Whitney v. Spearman*..... 617
35. In a proceeding under ch. 8, Comp. Stats., to wind up an insolvent bank, a judgment overruling the bank's motion to discharge an order requiring the receiver to sue stockholders for their unpaid subscriptions, is appealable. *State v. German Savings Bank* 734

Issues.

36. Petition in error may be dismissed where it presents no question of an existing substantive right of plaintiff in error. *Edgerton v. State*..... 72

Review—continued.

37. On appeal to the district court the cause must be tried with the issues unchanged, except as to matter arising after the trial in the inferior court. *Bellamy v. Chambers*..... 146
 38. Grounds for setting aside a judicial sale are unavailing on review unless they were presented in the court below. *Creighton University v. Riley*..... 341
 39. The statute of limitations cannot be invoked for the first time in the supreme court. *Bell v. Rice*..... 547
 40. Questions not raised below will be disregarded upon review. *Raymond v. Leinberger*..... 817
- Jurisdictional Amount.*
41. Whether a judgment of a justice of the peace is appealable depends upon the amount claimed in the bill of particulars and not upon the amount recovered. *Bates v. Phoenix Publishing Co.*..... 79
- Laches.*
42. A judgment or decree from which no appeal has been taken within the statutory time will not be reviewed by the appellate court. *Omaha Loan & Trust Co. Savings Bank v. Knight*.. 342
 43. An appeal taken to the supreme court after six months from the date of rendition of the decree sought to be reviewed, may be dismissed. *Renard v. Thomas*..... 398
- New Trial.*
44. An assignment in a petition in error that the court erred in denying the motion for a new trial is too indefinite to be available where several distinct grounds are stated in the motion. *Hans v. State*..... 151
- Objections.*
45. A record to review error in permitting improper remarks of counsel must show an objection at the time, a ruling thereon, and an exception to the ruling. *Golder v. Lund*..... 867
- Prejudicial Error.*
46. A judgment will not be reversed for error in instructions where prejudice to the party complaining has not been shown. *Storz v. Finklestein*..... 177
 47. Prejudicial error only is ground for reversal. *Merchants Savings Bank of Providence v. Noll*..... 615
 48. Refusal to allow a continuance applied for on the ground of absent witnesses, where it is admitted that the witnesses, if present, would testify as stated in the affidavit in support of the motion, is not ground for reversal, in absence of an abuse of discretion on part of the trial court. *Fanton v. State*, 351
- Remedy.*
49. A proceeding in error to review an order of the board of equalization in a matter within its jurisdiction, will generally afford an adequate remedy. *Webster v. City of Lincoln*..... 1
- Supersedeas.*
50. A supersedeas bond is not essential to a review of a decree in equity. *Creighton v. Keith*..... 810

Review—concluded.

51. A supersedeas bond is not essential to a review of a final order, but is indispensable to a stay of proceedings pending review. *State v. Ramsey*..... 165
52. A supersedeas bond is necessary to a stay of proceedings under a decree in equity pending appeal. *Creighton v. Keith*.... 810
53. A bond, though filed and approved, will not operate as a supersedeas unless it contains the conditions prescribed by law. *State v. Ramsey*..... 167
54. A proper supersedeas bond executed, filed, and approved in a cause will not supersede a decree subsequently rendered in another action between the same parties. *Id.*
Transcripts.
55. On motion to dismiss appeal from a justice of the peace on the ground that the amount claimed was less than \$20, the district court, in determining its jurisdiction, should look alone to the transcript authenticated by the justice. *Bates v. Phoenix Publishing Co.*..... 79
56. A judgment within the jurisdiction of the district court may be affirmed when presented for review upon the original pleadings and a certified copy of the final order assailed. *Peck v. Nebraska Loan & Trust Co.*..... 227
57. The original pleadings and a certified copy of the judgment below will not answer the purpose of a transcript of the proceedings. *Id.*
58. Original pleadings below will not take the place of a statutory transcript for review, though the parties stipulate that such papers may be used for that purpose. *Smith v. Beagle*.. 445
59. The certified transcript of proceedings below imports verity. *Merchants Savings Bank of Providence v. Noll*..... 615
60. Where the transcript for review is incorrect or incomplete, it can only be corrected in the court below. *Id.*
61. The record as to the time a finding was made prevails as against an objection based on the hypothesis that the finding was earlier made, in the absence of some showing of record in support of the objection. *Seaver v. Hall*..... 878
Trial.
62. Where a judgment of a county court is reversed by a district court in a proceeding in error, the district court may retain the cause for trial. *Maryott v. Gardner*..... 320

Revocation. See WILLS, 5, 6.

Sales. See CORPORATIONS, 1. GUARANTY. RECEIVERS.

Bill of Sale.

1. A bill of sale in payment of an antecedent debt, in absence of an intent to defraud other creditors of the seller, *held* valid. *Rachman v. Clapp*..... 648

Deceit.

2. The rule that a purchaser cannot rely upon representations

Sales—concluded.

as to a matter of law, does not apply to a representation relating to the law of another state. *Wood v. Roeder*..... 476

3. One who was induced, through false and fraudulent representations of seller as to the statute of limitations, to buy an uncollectable county warrant issued in another state, may maintain an action against the seller for the purchase money, where payment of the warrant has been refused on the ground that the claim is barred. *Id.*
4. A buyer may rely upon representations consisting of direct statements or asserted facts, where an investigation would be necessary to ascertain the truth. *Olcott v. Bolton*..... 780

Description of Property.

5. Where a contract contains two descriptions of the property to be conveyed, one correct and the other false in fact, the latter should be rejected as surplusage. *Woods v. Hart*..... 497

Payment.

6. Under a contract for the sale of corn, stating price, and time and place of delivery, but not providing for time, place, or manner of payment, the seller may require payment in cash on delivery. *Behrens v. Beyschlag*..... 305
7. Under a contract for the sale of corn where payment is to be made on delivery, it is not necessary for the buyer to have, at the time and place of delivery, sufficient money to pay for all the corn purchased, he being able, ready, and willing during the whole time assigned for delivery to make payment in the manner contemplated by the contract. *Id.*

Rescission.

8. A buyer who returned the property and demanded a rescission as soon as he learned that the seller's representations were false, asserted his rights in time to be protected. *Olcott v. Bolton*..... 779
9. The fact that a buyer obtained information other than that contained in the seller's statements will not prevent him from rescinding the contract for false representations of the seller, the falsity not having been discovered until after sale. *Id.*
10. One injured by purchasing bank stock in reliance upon material and false representations positively made by the seller as statements of fact relating to the value of the stock, may rescind the contract or sue for damages, though the seller was without knowledge as to the truth or falsity of the statements and believed them to be true. *Id.*

Schools and School Districts.

1. Fines, penalties, or license moneys, in the hands of the treasurer of a city of the first class having over 8,000 and less than 25,000 inhabitants, are properly distributable among the common schools which territorially constitute a part of the city. *King v. State*..... 66
2. Where a teacher was employed for three months with option

Schools and School Districts—concluded.

to her to teach during the school year, service rendered by her after the expiration of three months, without objection, held to have been performed under the original contract of employment, and that a new contract was not necessary to bind the district for the entire school year. *Wallace v. School District* 171

3. A qualified teacher cannot be discharged at the pleasure of the district, but only where just cause exists therefor, in absence of a stipulation to the contrary in the contract of employment. *Id.*
4. Where a teacher duly employed for a fixed period is wrongfully dismissed before expiration of the term, the district is liable. *Id.*

Secretary of State. See ELECTIONS, 1-4.

Sentence. See CRIMINAL LAW, 6. INTOXICATING LIQUORS, 2.

Set-Off and Counter-Claim. See PRINCIPAL AND AGENT, 4. USURY.

Where, to a counter-claim well pleaded, the plaintiff interposes no reply, a verdict in his favor in excess of the amount claimed in his petition, less the amount of such counter-claim, should be set aside as unsupported by the pleading. *Ashland Land & Live Stock Co. v. Woodford*..... 118

Sheriffs and Constables. See EXECUTIONS. SUMMONS, 2.

Special Findings. See TRIAL, 9, 10.

Specific Performance. See VENDOR AND VENDEE, 8.

Evidence held to sustain findings for plaintiff in an action for the specific enforcement of a contract for the exchange of property. *Woods v. Hart*..... 497

State.

1. In absence of a specific appropriation made by law, the executive officers have no power to expend public funds. *State v. Moore* 88
2. An appropriation, within the meaning of the constitution, is the setting apart by law of a certain sum from the public revenue for a specified purpose, so that the executive officers are authorized to expend that sum, and no more, for that purpose, and no other. *Id.*
3. An appropriation is not specific if it leaves the amount to be expended to be limited only by the extent of claims which may regularly be made upon it by the recipients, the amount of those claims being uncertain. *Id.*
4. Appropriations can only extend to the end of the next fiscal quarter succeeding the adjournment of the next regular session of the legislature, and an act by its express terms enduring for a longer period cannot be construed as carrying an appropriation without making it void as in conflict with the constitution. *Id.*

State—concluded.

5. The state printing board will not be mandamusd to award a printing contract to one who fails to show that his bid was accompanied by the bond required by statute. *State v. Bartley* 874

State Board of Transportation. See RAILROAD COMPANIES, 1.

Statute of Frauds.

- The statute of frauds relative to the sale of lands will not enable one who has obtained the title and possession of real property to avoid making payment therefor merely because there had been no formal acceptance in writing of the original written offer of the purchaser. *Griffith v. Thompson*..... 424

Statutes. See BANKS AND BANKING, 13. MUNICIPAL CORPORATIONS, 12. Table, *ante*, p. liii.

1. When certain language is used in a statute and language of similar import has previously been used in other acts, and has received a practical interpretation by the legislative and executive departments of the government, while such practical construction will not control the courts in construing the later act, it will generally be presumed that the language of the later act was adopted with a view to such practical construction given the earlier act. *State v. Moore*..... 89
2. A simultaneous repeal and re-enactment of a statute, or section thereof, in terms or in substance, is a mere affirmance of the original and not a repeal thereof in the strict or constitutional sense. *Stenberg v. State*..... 127
Douglas County v. Keller..... 129
3. The act of 1887 entitled "An act to amend section 23 of an act entitled 'An act concerning counties and county officers,' approved March 1, A. D. 1879," did not repeal the succeeding section 24 of the act of 1879, as dependent upon section 23; neither did it repeal section 24 by implication. *Id.*
4. An act complete in itself is not inimical to the constitutional requirement that no law shall be amended unless the new act contains the section or sections so amended, though such complete act may be repugnant to, or in conflict with, a prior law not referred to nor in express terms repealed by the later act. *State v. Cornell*..... 526
5. The act entitled "An act to amend chapter 13 of the Revised Statutes of 1866, entitled 'Courts,'" approved Feb. 27, 1879 (Session Laws, p. 82), was an act complete in itself, and the provisions therein made for stenographic reporters and their compensation were germane to its purposes. *Id.*

Stenographers. See STATUTES, 5.

Stipulations. See BILL OF EXCEPTIONS, 8. INTEREST, 1.

Stock. See CORPORATIONS, 1.

Stockholders. See BANKS AND BANKING, 6, 7, 11-13.

Street Railways.

1. Street railway companies are common carriers, and as such are required to exercise more than ordinary skill and precaution in order to insure the safety of passengers. *East Omaha Street R. Co. v. Godola*..... 906
2. A street railway company, by undertaking the transportation of passengers for hire, assumes towards them the relation of a common carrier, without regard to the character of the easement possessed by it in its right of way. *Id.*
3. Standing on the platform of a crowded street car in motion is not such negligence as will prevent a passenger from recovering for injuries resulting from the negligence of persons in charge of the car. *Id.*

Streets. See HIGHWAYS.

Subrogation.

1. The right of subrogation exists in favor of a creditor who has paid the amount of a mortgage or other incumbrance in order to protect his own subordinate lien, or when as the holder of such subordinate lien he has, through mistake or inadvertence, satisfied a prior lien upon the property covered thereby. *Seicroe v. Homan*..... 601
2. The right of subrogation must in every case rest upon some recognized principle of equity jurisprudence, such as a mistake of fact, an agreement or understanding that the money advanced was for the express purpose designated, or the like. *Id.*
3. Evidence held sufficient to sustain a finding that a mortgagee, in discharging his liens, and in taking a second mortgage, did not act through inadvertence or mistake, and that he was not entitled to subrogation as against the rights of intervening lienors. *Id.*

Sugar Bounties. See BOUNTIES.

Summons. See APPEARANCE. INSURANCE, 10.

1. There was no service upon a corporation where the persons served were not officers of, or connected with, the corporation. *Campbell Printing Press & Mfg. Co. v. Marder*..... 283
2. Extrinsic evidence is admissible to impeach the return of an officer as to service of process. *Id.*

Supersedeas. See REVIEW, 50-54.

Supreme Court. See COURTS, 1.

Surface Water. See DAMAGES, 3. WATERS.

Taxation. See LIMITATION OF ACTIONS, 1. MUNICIPAL CORPORATIONS, 13.

1. Where plaintiff in a suit to enjoin the collection of taxes claims that an error proceeding from an order of the board of equalization would be inadequate, the facts upon which

Taxation—concluded.

- his claim is based must be pleaded and proved. *Webster v. City of Lincoln*..... 1
2. A county board has no authority to levy taxes which in the aggregate exceed \$1.50 per \$100 valuation, unless authorized so to do by the vote of the electors of the county, except for the payment of indebtedness existing at the date of the adoption of the constitution. *Chicago, B. & Q. R. Co. v. Nemaha County* 393
3. Taxes levied in excess of the constitutional limit are illegal and unauthorized. *Id.*
4. Remedies where one pays illegal taxes under protest. *Id.*
5. One paying, under protest, taxes in excess of the constitutional limit, may recover such excess in an action at law without presenting his claim to the county board. *Id.*

Teachers. See SCHOOLS AND SCHOOL DISTRICTS, 2-4.

Time. See VENDOR AND VENDEE, 8.

Transcripts. See REVIEW, 55-61.

Trees. See DAMAGES, 3.

Trial. See CRIMINAL LAW. DAMAGES, 2. JURY. JUSTICE OF THE PEACE, 1. NEW TRIAL. SET-OFF AND COUNTER-CLAIM.

Exceptions.

1. An exception, well taken, to the exclusion of evidence is not waived by a failure to present the same ground of objection by an exception to an instruction. *Rosenthal v. Ogden*..... 219

Jurors. Memoranda.

2. In a suit on a fire insurance policy to recover the value of articles destroyed, *held* that the court did not abuse its discretion in permitting jurors, during the trial, to make memoranda of the articles and of the value placed thereon by the evidence. *Omaha Fire Ins. Co. v. Crighton*..... 314

Misconduct of Attorneys.

3. Generally a judgment will not be reversed for improper remarks of counsel, where the jury is directed to disregard the statements, and the misconduct is not repeated. *Golder v. Lund* 867
4. An admonition by counsel directing the jury to disregard improper remarks made by him is equivalent to one directed by the court. *Id.*

Verdicts and Findings.

5. A verdict which is responsive to all the issues made by the pleadings will not be rejected because of immaterial findings. *Baum Iron Co. v. Union Savings Bank*..... 387
6. Where a verdict is sufficient to authorize a judgment, and there is no substantial variance between it and the judgment, the case will not be reversed for an informality in the verdict. *Id.*

Trial—concluded.

7. Where only one conclusion can be drawn from the undisputed facts, the court may direct a verdict consistent therewith. *Knapp v. Jones*..... 490
8. General and special verdicts *held* not inconsistent. *Town v. Missouri P. R. Co.*..... 763
9. Error cannot be predicated upon failure of the court to include in a list of questions for special findings one not requested. *Id.*
10. Where an answer to a question submitted for a special finding would have been immaterial, a judgment on the general verdict, without such special finding, *held* not prejudicially erroneous. *Id.*

Trover and Conversion. See EXECUTIONS, 7. REPLEVIN, 1.

In an action by a mortgagee of chattels against a stranger for conversion of the property, the petition must set out the facts constituting plaintiff's special ownership. *Raymond v. Miller* 506

Trusts. See FRAUDULENT CONVEYANCES, 7.

Where the cashier of a bank used the bank's funds to purchase stock in another bank, a court of equity may charge the stock with a trust in favor of the bank whose funds were wrongfully used to purchase the stock. *Tecumseh Nat. Bank v. Russell* 277

Ultra Vires. See HIGHWAYS, 3.

Usury.

1. Any rate of interest agreed upon not exceeding ten per cent per annum is valid, and interest may be taken yearly or for any shorter period, or in advance. *Steen v. Stretch*..... 572
2. *Held*, Not usurious to compute interest according to the method known as "bank discount." *Id.*
3. A loan of money with which the borrower paid a usurious debt, *held* not tainted with usury. *Id.*
4. Usury paid to a national bank cannot be set off in a suit by it, commenced more than two years after such payment, to recover the principal debt. *Montgomery v. Albion Nat. Bank*.. 652
5. Where, in a suit on a note, the defense of usury is established, the defendant is entitled to recover his costs, and such recovery applies to costs incurred in suing out an attachment in the case. *Id.*
6. To constitute a plea of usury facts must be stated which disclose a contract between the parties thereto by which there is received or reserved a rate of interest in excess of the maximum allowed by law. *McKinley v. Aldrich*..... 785

Vendor and Vendee. See COUNTIES, 3, 4. GUARDIAN AND WARD. SALES. STATUTE OF FRAUDS.

Description of Property.

1. A contract for the exchange of realty is not void for indefi-

Vendor and Vendee—concluded.

niteness of description, where the description is sufficient, by aid of evidence *aliunde*, to enable the property to be identified. *Woods v. Hart*..... 497

False Representations.

2. Evidence examined, and held to sustain a judgment for damages on account of fraudulent representations by the vendor touching the character and value of improvements upon lands conveyed. *Mullen v. Kinsey*..... 466
3. A purchaser has a right to rely upon the representations of his vendor as to the quality and location of the land, and the character of the improvements thereon, whenever the facts concerning which such representations are made are not within the knowledge of the purchaser. *Id.*

Bona Fide Purchasers.

4. Evidence held sufficient to sustain findings that defendants were innocent purchasers for value from J. T. Ward, and that they did not assume payment of plaintiffs' judgment erroneously entered against him as "S. T. Ward." *Aultman v. Ward* 942
5. A *bona fide* purchaser of land is one who purchases it for a valuable consideration, paid or parted with, without notice of any suspicious circumstances to put him upon inquiry. *Carpenter Paper Co. v. Wilcox*..... 659

Breach of Contract. Damages.

6. Where a vendor of land cannot make title, the vendee may at his election recover payments of purchase money with interest, or damages for the loss of his bargain. *Seaver v. Hall*, 878
7. Where two or more persons have contracted to convey land to a third person, the vendors cannot, by contract or conveyance among themselves, release any of them from the obligation to respond to the vendee for damages arising from a breach of the contract. *Id.*

Specific Performance.

8. Where time is not of the essence of the contract, a vendor who is unable to make title at the time he should convey, may have specific performance by tendering good title at any time before decree, provided he has acted in good faith and specific performance can be enforced without injustice to the vendee, and in such case an awarding of rents to the vendee together with costs, in the absence of special circumstances, adjusts the equities. *Id.*

Verdict. See TRIAL.

Vice-Principal. See MASTER AND SERVANT, 1-4.

Waiver. See APPEARANCE, 1. ARBITRATION AND AWARD, 4. BILL OF EXCEPTIONS, 1-4, 13. CORPORATIONS, 2. INSURANCE, 8. PLEADING, 6.

Warrants. See SALES, 3.

Water Companies. See MUNICIPAL CORPORATIONS, 13, 14.

Waters.

Surface Waters.

1. The doctrine of the common law in regard to surface waters is in force. *Town v. Missouri P. R. Co.*..... 769
2. Surface waters may be controlled by the owner of the land on which they originate or over which they flow. *Id.*
3. In constructing an embankment across a well-defined channel cut by surface waters, some provision may be necessary for the allowance of the flow of the surface water. *Id.*
4. Whether an embankment across a well-defined channel cut by surface waters has been negligently constructed, and whether the negligence, if any, is the proximate cause of injury, are generally questions of fact for the jury. *Id.*

Water-Courses.

5. A water-course is a stream as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes. *Id.*..... 768
6. To constitute a water-course the size of the stream is not material. *Id.*
7. There may be a water-course without a continuous flow of water. *Id.*
8. The right of a land owner to control surface water must be so exercised as not to unnecessarily or negligently cause injury to the rights and property of others. *Id.*..... 769
9. Evidence held sufficient to sustain a finding that damages by surface water did not result from negligence of a railroad company in constructing an embankment across a channel cut by surface water. *Id.*

Wills.

Lost Will.

1. The contents of a lost will cannot be proved solely by the declarations of the testator. *Clark v. Turner.*..... 290
2. Testator's declarations may be admissible to corroborate more direct evidence. *Id.*
3. The testimony of a witness as to the contents of a will, his knowledge being derived from the testator's reading the will to him, and not from having himself inspected it, is in effect only testimony as to the testator's declarations. *Id.*

Attorneys' Fees.

4. Attorneys' fees cannot be allowed in contest proceedings to unsuccessful proponents of a will, and if such proponents are entitled to reimbursement out of the estate, it must be had in the course of administration. *Id.*

Revocation.

5. The common-law doctrine that the revocation of a will may be implied from subsequent changes in the condition or circumstances of the testator obtains in so far as it has not been modified by statute. *Baucke v. Baucke.*..... 18

Wills—concluded.

6. An absolute revocation of a will cannot be implied from the obtaining of a divorce from the testator by his wife after the making of the will, from the death of one of his children for whom provision was made in the will, and from the birth of three children to such deceased child, prior to the testator's death. *Id.*

Witnesses. See ASSAULT AND BATTERY, 5. CRIMINAL LAW, 4. EVIDENCE, 3, 10-14.

Words and Phrases.

1. "Action." *Gibson v. Sidney*..... 12
2. "Appropriations." *State v. Moore*..... 88
3. "Bank discount." *Steen v. Stretch*..... 575
4. "Cause." *Gibson v. Sidney*..... 12
5. "Claims." *Douglas County v. Taylor*..... 536
6. "Necessaries." *Bell v. Rice*..... 547
7. "Park." *Ehmen v. Village of Gothenburg*..... 715
8. "People." *Bryan v. City of Lincoln*..... 622
9. "Sidewalk." *City of Ord v. Nash*..... 335
10. "When the same shall have been authorized by a vote of the people." *Bryan v. City of Lincoln*..... 620

Writs. See SUMMONS.